No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

VIRGINIA G. VILLA *
2689 230th Avenue
St. Croix Falls, WI 54024
(207) 745-6156
villa_virginia@hotmail.com

SARAH M. KONSKY
BRENNA WOODLEY
STEVEN J. HOROWITZ
JASON G. MARSICO
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Counsel for Petitioners

DONALD B. VERRILLI, JR. *
SOLICITOR GENERAL
UNITED STATES
DEPARTMENT OF JUSTICE
950 Pennsylvania Ave, N.W
Washington, D.C. 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Counsel for Respondent

* Counsel of Record

Additional counsel on inside front cover

December 17, 2015

PETITION FOR WRIT OF CERTIORARI FILED: JUNE 4, 2015
CERTIORARI GRANTED: OCT. 30, 2015

JEFFREY T. GREEN
SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY SUPREME
COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8578

Counsel for Petitioners

TABLE OF CONTENTS

Page

United States District Court of Maine (Bangor), *United States* v. *Voisine*, No. 1:11-cr-00017-JAW-1, Relevant Docket Entries 1

Opinion, *United States* v. *Voisine, et al.*, Nos. 12-1213, 12-1216 (1st Cir. Jan. 30, 2015) 6

Order Denying Petition for Rehearing and Rehearing En Banc, *United States* v. *Voisine, et al.*, Nos. 12-1213, 12-1216 (1st Cir. Mar. 31, 2015) 91

Information: Stephen L. Voisine, *United States* v. *Voisine*, No. 1:11-Cr-17-JAW (D. Me. Feb. 10, 2011) 93

Transcript, *Maine* v. *Voisine*, No. HOUDC-CR-2003-210 (Dist. Ct. Me. Feb. 2, 2004) ECF No. 10-1 95

Complaint, *Maine* v. *Voisine*, No. CR-2003-210 (Dist. Ct. Me. June 2, 2003) ECF No. 10-2 98

Order on Motion to Dismiss, *United States* v. *Voisine*, No. 1:11-cr-00017-JAW (D. Me. Apr. 14, 2011) 99

Order on Motion to Dismiss, *United States* v. *Bryant*, No. 1:11-cr-00021-JAW (D. Me. Apr. 13, 2011) 101

Conditional Plea, *United States* v. *Voisine*, No. 11-CR-00017-B-W (D. Me. Apr. 14, 2011) 116

Transcript of Proceedings, *United States* v. *Voisine*, No. 1:11-cr-00017-JAW-1 (D. Me. June 13, 2011) 118

Opinion, *United States* v. *Voisine*, No. 12-1213 (1st Cir. Jan. 18, 2013) 145

TABLE OF CONTENTS—continued

Page

United States District Court of Maine (Bangor), *United States* v. *Armstrong*, No. 1:11-cr-00050-JAW-1, Relevant Docket Entries 147

Indictment, *United States* v. *Armstrong*, No. 11cr50-B-W (D. Me. Apr. 13, 2011) ECF No. 2. 152

Complaint, *Maine* v. *Armstrong*, No. CR-08-432 (Super. Ct. Me. Dec. 30, 2008) ECF No. 19-1 ... 154

Plea & Sentencing, *Maine* v. *Armstrong*, No. FARSC-CR-2008-00432 (Super. Ct. Me. Dec. 30, 2008) ECF No. 19-2 156

Conditional Plea, *United States* v. *Armstrong*, No. 11-50-B-W (D. Me. Sept. 26, 2011) ECF No. 45 164

Transcript of Proceedings, *United States* v. *Armstrong*, No. 1:11-cr-00050-JAW-1 (D. Me. Sept. 26, 2011) 165

Opinion, *United States* v. *Armstrong*, No. 12-1216 (1st Cir. Jan. 18, 2013) 186

U.S. DISTRICT COURT
DISTRICT OF MAINE (BANGOR)

Criminal Docket For Case #: 1:11-cr-00017-JAW-1

USA

v.

VOISINE

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
		* * *
03/11/2011	2	INFORMATION as to STEPHEN L VOISINE (1) count(s) 1, 2. (jlg) (Entered: 03/11/2011)
		* * *
03/15/2011	10	MOTION to Dismiss *Count I of the Information with Incorporated Memorandum* by STEPHEN L VOISINE Responses due by 4/5/2011. (Attachments: # 1 transcript of 2/2/04, # 2 complaint)(VILLA, VIRGINIA) Modified on 3/15/2011 to name attachments (bld). (Entered: 03/15/2011)
		* * *

DATE	NO.	DOCKET TEXT
04/14/2011	14	ORDER denying 10 Motion to Dismiss Count I of the Information as to STEPHEN L VOISINE (1). By JUDGE JOHN A. WOODCOCK, JR. (MFS) (Entered: 04/14/2011)
04/14/2011	15	NOTICE OF HEARING as to STEPHEN L VOISINE Change of Plea Hearing set for 5/17/2011 02:00 PM in Main Courtroom, Bangor before JUDGE JOHN A. WOODCOCK JR. The defendant will be required to identify every prescription medication he is taking and to specify the dosage and frequency, purpose and effects of the medication. (The same requirement applies to medications prescribed but NOT taken, with an additional requirement that the defendant explain why it was not taken and the consequences of the failure to take it.) Failure to do so satisfactorily may result in the judges refusal to accept the plea. Counsel may find it convenient to use a written list for this purpose. Counsel shall file the prosecution version and any plea agreement at least 2 business days prior to the change of plea. (Check for Receipt of Prosecution Version and any Plea Agreement on 5/13/2011.) (jgw) (Entered: 04/14/2011)

* * *

DATE	NO.	DOCKET TEXT
06/13/2011	24	Minute Entry for proceedings held before JUDGE JOHN A. WOODCOCK, JR: Change of Plea Hearing held as to STEPHEN L VOISINE, Conditional Guilty Plea entered as to Count 1; Guilty plea entered as to Count 2; Plea accepted. Conditional Plea signed. Defendant released on same bail conditions. (Court Reporter: Julie Edgecomb) (jlg) (Entered: 06/13/2011)
06/13/2011	25	CONDITIONAL PLEA as to STEPHEN L VOISINE. (jlg) (Entered: 06/13/2011)
		* * *
02/13/2012	41	Minute Entry for proceedings held before JUDGE JOHN A. WOODCOCK, JR: Sentencing held on 2/13/2012 as to STEPHEN L VOISINE. Defendant sentenced to 12 months and 1 day on Count 1 and 9 months imprisonment on Count 2 to be served concurrently; 2 years supervised release on Count 1 and 1 year supervised release on Count 2; $125.00 special assessment. Defendant released on same bail conditions and to self-report on March 30, 2012. (Court Reporter: Julie Edgecomb) (jlg) (Entered: 02/13/2012)
		* * *

DATE	NO.	DOCKET TEXT
02/14/2012	43	JUDGMENT as to STEPHEN L VOISINE (1), Count(s) 1, 2, Defendant sentenced to 12 months and 1 day on Count 1 and 9 months imprisonment on Count 2 to be served concurrently; 2 years supervised release on Count 1 and 1 year supervised release on Count 2; $125.00 special assessment. Defendant to self-report. By JUDGE JOHN A. WOODCOCK, JR. (jlg) (Entered: 02/14/2012)
02/15/2012	44	NOTICE OF APPEAL by STEPHEN L VOISINE. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from our web site at http://www.med.uscourts.gov/operations/forms/transcript order.pdf MUST be completed and submitted to the Court of Appeals. NOTICE TO COUNSEL: Counsel should register for a First Circuit CMECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel should also review the First Circuit requirements for electronic filing by visiting the CMECF Information section at http://www.ca1.uscourts.gov/efiling.htm. (VILLA, VIRGINIA) (Entered: 02/15/2012)

* * *

DATE	NO.	DOCKET TEXT
01/18/2013	52	OPINION of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment,, Check for Receipt of Mandate on 2/19/2013. (jgw) (Entered: 01/22/2013)
01/18/2013	53	JUDGMENT of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment (jgw) (Entered: 01/22/2013)
02/21/2013	54	MANDATE of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment. (jlg) (Entered: 02/21/2013)
		* * *
01/30/2015	82	OPINION of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment, Check for Receipt of Mandate on 3/2/2015. (jgw) (Entered: 01/31/2015)
01/30/2015	83	JUDGMENT of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment (jgw) (Entered: 02/02/2015)
04/08/2015	84	MANDATE of USCA as to STEPHEN L VOISINE re 44 Notice of Appeal – Final Judgment. (jlg) (Entered: 04/09/2015)
		* * *

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 12-1213, 12-1216

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN L. VOISINE;
WILLIAM E. ARMSTRONG III,

Defendants, Appellants.

Appeals from the United States District Court
for the District Of Maine

[HON. JOHN A. WOODCOCK, *U.S. District Judge*]

January 30, 2015

Before

LYNCH, *Chief Judge*,
TORRUELLA and STAHL, *Circuit Judges*.

VIRGINIA G. VILLA, Assistant Federal Defender, Federal Defender Office, for appellants.
RENÉE M. BUNKER, Assistant United States Attorney, with whom THOMAS E. DELAHANTY II, United States Attorney, was on brief, for appellee.

LYNCH, *Chief Judge*. The Supreme Court has directed us, in light of *United States v. Castleman*, 134 S. Ct. 1405 (2014), to consider again our decision in these two cases that both defendants had indeed been convicted under state law of "misdemeanor crimes of domestic violence," as defined in 18 U.S.C. § 921(a)(33)(A), even though the state statutes allowed conviction based on a recklessness *mens rea*. *Armstrong v. United States*, 134 S. Ct. 1759 (2014) (Mem.); *see United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013); *United States v. Voisine*, 495 F. App'x 101 (1st Cir. 2013) (per curiam). If so, then their motions to dismiss their federal charges for possessing firearms after such convictions, in violation of 18 U.S.C. § 922(g)(9), were properly denied.

Our answer is informed by congressional recognition in § 922(g)(9) of the special risks posed by firearm possession by domestic abusers. "Domestic violence often escalates in severity over time . . . and the presence of a firearm increases the likelihood that it will escalate to homicide . . . ." *Castleman*, 134 S. Ct. at 1408. It is also informed by the congressional choice in the federal sentencing scheme to honor each state's choice as to how to define its own crimes, through statutory text and judicial decision.

As we see it, this case turns on the unique nature of § 922(g)(9). That section is meant to ensure that individuals who engage in the "seemingly minor act[s]" that actually constitute domestic violence, like squeezing and shoving, may not possess a firearm. *Castleman*, 134 S. Ct. at 1412. This range of predicate acts is broader than that found in other federal prohibitions involving the use of physical force. Applying the teachings of *Castleman*, we find that

Maine's definition of reckless assault fits within § 922(g)(9).

We affirm the denial of the motion to dismiss the indictment and information here. That means the conditional guilty pleas the defendants entered are valid and their sentences stand. The question is close and we rule narrowly.

I.

A. *Statutory Background*

As the Supreme Court observed in *Castleman*, 18 U.S.C. § 922(g)(9) was enacted to close a loophole. "While felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors." *Castleman*, 134 S. Ct. at 1409. No ban prevented those domestic abusers from possessing firearms, yet there is a "sobering" connection between domestic violence and homicide. *Id.* The "manifest purpose" of § 922(g)(9), the Lautenberg Amendment to the Gun Control Act of 1968, was to remedy the "potentially deadly combination" of "[f]irearms and domestic strife." *United States v. Hayes*, 555 U.S. 415, 426-27 (2009).

Under § 922(g)(9), it is against federal law for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to "possess in or affecting commerce[] any firearm or ammunition." In turn, a "misdemeanor crime of domestic violence" is defined in § 921(a)(33)(A) as an offense that (1) is a misdemeanor under federal, state, or tribal law, and (2) "has, as an element, the use or attempted use of physical force . . . committed by a current or former spouse, parent, or guardian of the victim" or by a person in a similar domestic relationship with the victim.

The predicate offenses in these cases are convictions under Maine assault statutes. Me. Rev. Stat. Ann. tit. 17-A, §§ 207(1)(A), 207-A(1)(A). Under Maine law, a "person is guilty of assault if [t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." *Id.* § 207(1)(A). A violation of § 207 constitutes misdemeanor domestic violence assault if the "victim is a family or household member." *Id.* § 207-A(1)(A).

Maine law explains that "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result." *Id.* § 35(3)(A). The statute goes on to give more meat to the "conscious disregard" definition. It refers to disregard of a risk, "when viewed in light of the nature and purpose of the person's conduct and the circumstances known to that person," that "involve[s] a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." *Id.* § 35(3)(C).

B. *Facts*

William E. Armstrong III was convicted in 2002 and 2008 of assaulting his wife in violation of Maine's misdemeanor assault statutes, Me. Rev. Stat. Ann. tit. 17-A §§ 207(1)(A), 207-A(1)(A). In May 2010, twenty-nine months after the last domestic assault conviction, the Maine State Police searched the Armstrong residence for drug paraphernalia and marijuana. They discovered six firearms and ammunition. The police notified the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), which executed a search. That search uncovered only ammunition, but Armstrong later explained that he had arranged for a

friend to remove the guns. ATF agents observed the guns at the friend's home.

Armstrong was arrested and federally charged with being a prohibited person in possession of a firearm, in violation of § 922(g)(9). The indictment listed Armstrong's 2008 domestic violence assault conviction as the predicate offense.

Stephen L. Voisine was convicted in 2003 and 2005 of assaulting a woman with whom he was in a domestic relationship, in violation of Maine's assault statute. In 2009, acting on an anonymous tip, state and local law enforcement officials arrested Voisine on the federal misdemeanor charge of killing a bald eagle in violation of 16 U.S.C. § 668(a). When conducting a background check, they discovered his 2003 misdemeanor simple assault. As Voisine had turned a rifle over to the police during the investigation, the criminal information charged him with violating § 922(g)(9) as well as § 668(a).

C. *Procedural History*

Both Armstrong and Voisine moved to dismiss, arguing that their indictment and information did not charge a federal offense and that § 922(g)(9) violated the Constitution. The district court denied the motions, and both defendants entered guilty pleas conditioned on the right to appeal the district court's decision.[1]

---

[1] In February 2012, Armstrong was sentenced to three years of probation and a fine and special assessment totaling $2,600. Also in February 2012, Voisine was sentenced to a year and a day imprisonment on the § 922(g)(9) charge with two years supervised release, concurrent with nine months imprisonment and one year supervised release on the § 668(a) charge, and $125 in special assessments.

We consolidated Armstrong and Voisine's cases. In a January 18, 2013 opinion, we affirmed the district court's decisions. *Armstrong*, 706 F.3d at 1; *see Voisine*, 495 F. App'x. at 102 (incorporating the reasoning from Armstrong as there were "no pertinent factual differences" distinguishing the two cases). The defendants had argued that a misdemeanor assault on the basis of offensive physical contact, as opposed to one causing bodily injury, is not a "use of physical force," and, concordantly, not a "misdemeanor crime of domestic violence." Relying on *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011), and *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001), we held that § 922(g)(9) did not distinguish between violent and nonviolent convictions, and the statute included the offensive physical contact portion of the Maine statute within its definition of "physical force." *Armstrong*, 706 F.3d at 6; *Voisine*, 495 F. App'x at 101-02.

Second, the defendants argued that § 922(g)(9) violated the Second Amendment as applied to them. This argument was foreclosed by *Booker*, which denied an identical argument framed as a facial challenge. 644 F.3d at 22-26; *see Armstrong*, 706 F.3d at 7-8; *Voisine*, 495 F. App'x. at 101.

The defendants petitioned for certiorari. On March 31, 2014, the Supreme Court granted their petitions, vacated the judgments, and remanded "for further consideration in light of *United States v. Castleman*." *Armstrong v. United States*, 134 S. Ct. 1759 (2014) (Mem.). In *Castleman*, the Court had addressed the issue of whether the phrase "use of physical force" in § 921(a)(33)(A) required violence or could be satisfied by offensive touching. That issue had been the source of a circuit split. *Castleman* resolved the question in agreement with *Nason*, holding that "Congress

incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" *Castleman*, 134 S. Ct. at 1410. The Supreme Court left open whether a conviction with the *mens rea* of recklessness could serve as a § 922(g)(9) predicate. *Id.* at 1414. In footnote 8, the Court stated, "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," and listed ten cases.[2] *Id.* at 1414 n.8. It then added, "*But see United States v. Booker*, 644 F.3d 12, 19-20 (C.A.1 2011)." *Id.* The footnote did not say *Booker* was wrong. It gave no further definition of recklessness. Nor did it account for the differences in the statutory sections being interpreted in the other cases cited.

This case comes to us following the Supreme Court's remand.

II.

In construing § 922(g)(9)'s applicability to a given case, we use the "categorical approach." Under that approach the elements of the predicate offense (here, the Maine assault statute) must be identical to or categorically within the description of the subsequent provision (here, § 922(g)(9)). *See Castleman*, 134 S. Ct.

---

[2] *United States v. Palomino Garcia*, 606 F.3d 1317, 1335–36 (11th Cir. 2010); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Torres-Villalobos*, 487 F.3d 607, 615–16 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1127–32 (9th Cir. 2006) (en banc); *Garcia v. Gonzales*, 455 F.3d 465, 468–69 (4th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260, 263–65 (3d Cir. 2005) (Alito, J.); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003); *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001).

at 1413. Where, as here, the predicate statute is "divisible" into crimes with alternative sets of elements, we may consider whether the elements under which the defendant was convicted are still within the subsequent provision, an inquiry known as the "modified categorical approach." *Id.* at 1414. The government concedes that the record here of the state proceedings is too sparse to "discern under which prong of Maine's statute" the defendants were convicted, and they urge us against "resort[ing] to the modified categorical approach." For us to affirm, we must find that the Maine statute—including the reckless acts it prohibits—categorically fits within § 922(g)(9).

The defendants frame the issue as whether a reckless act can constitute a "use of physical force" and rely on cases interpreting statutes other than § 922(g)(9). We do not agree that is the proper way to frame the question. That framing is predicated on the notion that particular statutory language must be interpreted identically in different sections across the U.S. Code. To the contrary, context matters, as the Supreme Court demonstrated in *Castleman* itself. 134 S. Ct. at 1410-12. The question is whether Maine's definition of recklessness fits within § 921(a)(33)(A)'s phrase "use of physical force." Section 921(a)(33)(A) is a provision crafted in the unique context of domestic violence, and it should be so interpreted. *Castleman*, 134 S. Ct. at 1410-12 & n.4; *Booker*, 644 F.3d at 18-21.

This reframing of the question clarifies our approach to the two arguments raised by the defendants: that *Castleman* footnote 8 decides this case, and that *Castleman's* analysis of § 921(a)(33)(A) undermines our prior decisions. *Castleman's* emphasis

on context reinforces, rather than undermines, our earlier decision.

A. Castleman *Footnote 8*

The defendants read too much into *Castleman* footnote 8, which expressly does not resolve the question before us. Nor is their argument made by reference to the cases cited for contrast in the footnote. Each of those cases[3] construes a different statutory definition, and all but one arose in a different context.

---

[3] All but one of the ten cases cited in *Castleman* footnote 8 as deciding the § 922(g)(9) *mens rea* issue in fact considered other statutes in other contexts and followed the reasoning of *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004). Six cases analyzed 18 U.S.C. § 16. In *Oyebanji v. Gonzales*, 418 F.3d 260, 263-65 (3d Cir. 2005) (Alito, J.), the Third Circuit read *Leocal* to apply to § 16(b), which offered an alternative definition of "crime of violence" to § 16(a), and decided that reckless crimes cannot be crimes of violence under that section. Three other cases from the footnote did the same. *See Garcia v. Gonzales*, 455 F.3d 465, 467-69 (4th Cir. 2006) (interpreting § 16(b), as referenced in an immigration statute); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 559-62 (7th Cir. 2008) (same); *United States v. Torres-Villalobos*, 487 F.3d 607, 614-17 (8th Cir. 2007) (same). Two more interpreted the same provision, but without relying on *Leocal*, which had yet to be decided. *See Jobson v. Ashcroft*, 326 F.3d 367, 373-74 (2d Cir. 2003); *United States v. Chapa-Garza*, 243 F.3d 921, 926-27 (5th Cir. 2001). All of these cases interpreted the term "crime of violence" as part of an aggravated felony statute, and *Castleman* is clear that the interpretive rules governing felonies do not apply to misdemeanor crimes of domestic violence. 134 S. Ct. at 1411.

Three of the remaining four cases interpreted the term "use of physical force" in the context of a Sentencing Guidelines provision imposing an enhancement for defendants who were deported after committing a felony "crime of violence," U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A). Each of those cases analyzed the provision by analogizing to § 16 and applying *Leocal*. For example, in *United States v. Palomino Garcia*, the Eleventh Circuit explained that both § 16 and the Guidelines provision

Footnote 8 begins by describing the issue as an open question, with a citation to *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004). In *Leocal*, the Supreme Court interpreted 18 U.S.C. § 16(a), the definition of the term "crime of violence." 543 U.S. at 8-10. Such a crime requires "use of physical force," and *Leocal* held that the term "use" suggests a *mens rea* higher than negligence, but it withheld judgment on whether recklessness is sufficient, *Castleman*, 134 S. Ct. at 1414 n.8; *Booker*, 644 F.3d at 19-20.

Considering context, section 16(a) is not analogous to the section which concerns us, § 922(g)(9). *Castleman* itself distinguished the term "use of force" in § 16(a), a provision for undifferentiated violent crimes, from the term "use of physical force" in § 922(g)(9)'s domestic violence provision. "Domestic violence" is a "term of art" that "encompasses a range of force broader than that which constitutes 'violence' simpliciter," including "acts that might not constitute 'violence' in a nondomestic context." *Castleman*, 134 S. Ct. at 1411 & n.4. A "crime of violence," by contrast,

---

define the phrase "crime of violence," and they are "almost identically worded." 606 F.3d 1317, 1335 (11th Cir. 2010). It then cited *Leocal* and the other § 16 cases mentioned above to conclude that a "use of physical force" cannot be reckless. *Id.* at 1335-36; *see also United States v. Portela*, 469 F.3d 496, 498-99 (6th Cir. 2006); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008).

Even if § 16 were analogous to § 922(g)(9), that would not resolve the matter. The Third Circuit has explained that some reckless convictions can serve as predicates for § 16 offenses, depending on the nature of the recklessness. *Aguilar v. Att'y Gen.*, 663 F.3d 692, 698-700 (3d Cir. 2011); *cf. United States v. Espinoza*, 733 F.3d 568, 572-74 (5th Cir. 2013) (allowing a reckless conviction to be a predicate for a violent felony under the Armed Career Criminal Act).

"suggests a category of violent, active crimes." *Id.* at 1411 n.4 (quoting *Leocal*, 559 U.S. at 140) (internal quotation mark omitted). As the Supreme Court explained, a "'squeeze of the arm [that] causes a bruise'" is "hard to describe as . . . 'violence'" within the meaning of § 16, but "easy to describe as 'domestic violence'" within the meaning of § 922(g)(9). *Id.* at 1412 (alterations in original) (quoting *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003)) (internal quotation marks omitted).

Unsurprisingly, the drafting history of § 922(g)(9) indicates that "Congress expressly rejected" the § 16(a) definition, instead developing the term "misdemeanor crime of violence" that was "'probably broader' than the definition" in § 16. *Booker*, 644 F.3d at 19 (citing a statement by Sen. Lautenberg). And where Congress wanted to define a domestic violence crime as a § 16 crime of violence occurring in the domestic context, it has done so—even in the same legislation that contained the Lautenberg Amendment. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(E). "That it did not do so here suggests, if anything, that it did not mean to." *Castleman*, 134 S. Ct. at 1412 n.6.

The only case cited in *Castleman* footnote 8 from the domestic violence context is one in which Congress elected to define the crime with reference to § 16. In *Fernandez-Ruiz v. Gonzales*, the Ninth Circuit considered whether a reckless misdemeanor could serve as a predicate "crime of domestic violence." 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc) (citing 8 U.S.C. § 1227(a)(2)(E)(i)). Unlike § 922(g)(9), however, the relevant statute in *Fernandez-Ruiz* defined "crime of domestic violence" as a "crime of violence" (referencing § 16) committed against someone in a domestic relationship with the perpetrator. *Id.* at 1124-25. The

Ninth Circuit accordingly conducted a § 16 analysis, applying *Leocal* and cases from other circuits to reach its conclusion. *Id.* at 1127-32. But even that result did not follow so obviously from *Leocal*, as four judges dissented emphasizing the differences between domestic violence and other contexts. *Id.* at 1136 (Wardlaw, J., dissenting).

On remand of this case to us, the defendants' brief adds to the cases in the footnote by citing two other § 922(g)(9) cases, not mentioned in *Castleman*, which they say directly conflict with *Booker*. We disagree. In *United States v. White*, 258 F.3d 374 (5th Cir. 2001), the relevant predicate statute criminalized reckless "conduct that places another in imminent danger of serious bodily injury." *Id.* at 381. The court found that the statute did not require a completed "use of physical force," since it was satisfied by a risk of injury, and the statute extended beyond an "attempted use of force" because attempt liability requires specific intent rather than recklessness. *Id.* at 382-84. Rather than construing the phrase "use of physical force," as *Booker* did, *White* relied on principles of attempt liability to rule out reckless predicate crimes.

In *United States v. Howell*, 531 F.3d 621 (8th Cir. 2008), also added by the defendants, the predicate statute criminalized reckless "conduct which creates a grave risk of death or serious physical injury to another." *Id.* at 624. The court found this provision to be a "catch-all provision applicable to innumerable factual situations," so a completed "use of physical force" is not always or ordinarily present. *Id.*

Simply put, we are aware of no case—including the cases in *Castleman* footnote 8—in conflict with *Booker's* holding that a reckless misdemeanor assault

satisfies § 922(g)(9)'s particular definition of a "misdemeanor crime of domestic violence." Rather, § 922(g)(9)'s unique context, as described in *Castleman* and supported by the legislative history, suggests that § 922(g)(9) should be interpreted more broadly than other provisions, including § 16.

B. *Structure Of* Castleman

The defendants present a second argument, which is that *Castleman*'s analytical approach to the term "use of physical force" means the conduct of neither defendant here could meet that standard. *Castleman* held that Congress intended to incorporate the common law meaning of "force" in § 921(a)(33)(A), the definitional provision for "misdemeanor crime of domestic violence." 134 S. Ct. at 1410. "[A]bsent other indication, 'Congress intends to incorporate the well-settled meaning of the common law terms it uses.'" *Id.* (quoting *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013)) (internal quotation mark omitted). As a result, the statutory term "physical force" is satisfied by "the degree of force that supports a common-law battery conviction." *Id.* at 1413. The parties agree that, under *Castleman*, the term "use of physical force" also incorporates the common law *mens rea* for battery.

The parties approach this as a generalized question. They disagree about whether reckless acts could or could not constitute batteries at common law, and each side marshals support for its view. *See, e.g., Johnson v. United States*, 559 U.S. 133, 139 (2010); *Lynch v. Commonwealth*, 109 S.E. 427, 428 (Va. 1921); *Commonwealth v. Hawkins*, 32 N.E. 862, 863 (Mass. 1893); 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2(c)(2); 3 William Blackstone, *Commentaries* *120.

We decline the parties' invitation to define the *mens rea* of a common law battery independent of the interpretation Maine gives its own statute. *Castleman* explains that the term "use of physical force" includes "the type of conduct that supports a common-law battery conviction." 134 S. Ct. at 1411. *Castleman* also explains that Congress incorporated "the common-law meaning of 'force.'" *Id.* at 1410. *Castleman* holds that the term "use of physical force" includes both causing bodily injury and offensive contact. Defendants concede that reckless causation of bodily injury is a use of physical force. We see no reasoned argument that offensive physical contact does not similarly entail the use of force simply because it is inflicted recklessly as opposed to intentionally.

We follow the statutory scheme in evaluating whether a conviction under the Maine statute categorically counts as a "misdemeanor crime of domestic violence."

1. *The Scope of a "Misdemeanor Crime of Domestic Violence"*

As *Castleman* explained, § 922(g)(9) is a statute with a particular purpose: to ensure that domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms. 134 S. Ct. at 1408-12. "[B]ecause perpetrators of domestic violence are 'routinely prosecuted under generally applicable assault or battery laws,'" *id.* at 1411 (quoting *Hayes*, 555 U.S. at 427), we think Congress intended the firearm prohibition to apply to those convicted under typical misdemeanor assault or battery statutes. *See id.* at 1411, 1413. That encompasses assault statutes for those states that allow conviction with a *mens rea* of recklessness where recklessness is defined as including a degree of intentionality. A victim of

domestic violence often encounters the perpetrator again, and a broader reading of § 922(g)(9)'s *mens rea* requirement better ensures that a perpetrator convicted of domestic assault is unable to use a gun in a subsequent domestic assault. If Congress had wanted to impose a higher *mens rea*, it could have done so explicitly, as it did in the immediately preceding section of the bill that established § 922(g)(9). *Booker*, 644 F.3d at 18 & n.5.

This view is confirmed by the legislative history of § 922(g)(9). Senator Lautenberg explained that § 922 (g)(9) was a broad prohibition covering "any person convicted of domestic violence," without reference to a particular mental state. 142 Cong. Rec. S10377-01 (1996). Another senator made statements to the same effect. *See id.* Additionally, Senator Lautenberg described the law's application to scenarios without clear intent, in which domestic arguments "get out of control," "the anger will get physical," and one partner will commit assault "almost without knowing what he is doing." 142 Cong. Rec. S11872-01 (Sept. 30, 1996). Such conduct may not be "knowing," but it nonetheless constitutes a "use" of physical force—whether it causes offensive contact or bodily harm.

2. *Maine's Definition of "Recklessness"*

Whatever the common law meaning of battery as to recklessness, Maine characterizes recklessness as a *mens rea* involving a substantial amount of deliberateness and intent. The statutory definition requires that a person "*consciously* disregard[] a risk that the person's conduct will cause" the result. Me. Rev. Stat. Ann. tit. 17-A § 35(3)(A) (emphasis added). The disregard of the risk is "viewed in light of the nature and *purpose* of the person's conduct and the circumstances

known to the person." *Id.* § 35(3)(C) (emphasis added). Further, it must "involve a gross deviation" from the standard of reasonable care. *Id.*

Maine's definition of "recklessly," like its definition of "knowingly," includes an element of intentionality and specificity. To act "knowingly" in Maine, the person must be aware that the result is "practically certain" to occur. *Id.* § 35(2)(a). Maine's definitions of knowingly as contrasted with recklessly differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur. *Cf.* 2 LaFave, *Substantive Criminal Law*, § 5.4(f). To act knowingly and recklessly, but not negligently, the person must be aware of the risk: the recklessness definition requires reference to "the nature and purpose of the person's conduct and the circumstances *known* to the person." Maine's Supreme Judicial Court has made clear that the recklessness inquiry focuses on the person's "*subjective* state of mind." *Stein v. Me. Criminal Justice Acad.*, 95 A.3d 612, 618 (Me. 2014) (quoting *State v. Goodall*, 407 A.2d 268, 280 (Me. 1979)) (internal quotation mark omitted); *see State v. Hicks*, 495 A.2d 765, 771 (Me. 1985) (comparing the subjective test for recklessness with the objective test for negligence).

For example, the Maine Supreme Judicial Court has affirmed a conviction for "act[ing] recklessly when [the defendant] shot a powerful handgun into the woods in a residential area and in the direction of his next-door neighbor's home, knowing where it was located." *State v. Kline*, 66 A.3d 581, 584 (Me. 2013) (citing Me. Rev. Stat. Ann. tit. 17-A § 35). It also affirmed a conviction for reckless conduct with the use of a dangerous weapon when the defendant "drove his van alongside the victim's vehicle, remaining there . . .[,] used his van

to push the victim's vehicle into heavy oncoming traffic, and made contact with that vehicle at least once." *State v. York*, 899 A.2d 780, 783 (Me. 2006).

Maine's definition of recklessness includes a volitional component. In this, it is like other states. *See Fernandez-Ruiz*, 466 F.3d at 1141 (Wardlaw, J., dissenting) (collecting cases). Notwithstanding *Leocal*, some judges found that even § 16 encompassed reckless predicate convictions. In *Fernandez-Ruiz*, four dissenting judges of the Ninth Circuit observed that Arizona's definition of recklessness, like Maine's, requires that the person "be aware of a substantial and unjustifiable risk and affirmatively choose to act notwithstanding that risk." *Id.* Recklessness includes an "volitional, active decision, which necessarily involves 'a higher degree of intent than negligent or merely accidental conduct.'" *Id.* (quoting *Leocal*, 543 U.S. at 9); *accord Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 449-50 (4th Cir. 2005) (Niemeyer, J., dissenting) ("Unlike a person who accidentally injures another person, a person who acts recklessly in bringing about harm to another is aware of the nature of his conduct and thus can be said to be 'actively employ[ing]' the physical force that results in injury 'against another.'" (alteration in original) (quoting *Leocal*, 543 U.S. at 9)).

3. *Categorical Comparison*

We conclude that reckless assault in Maine is "use of physical force" within the meaning of a "misdemeanor crime of domestic violence." As noted above, § 922(g)(9) is meant to embrace those seemingly minor predicate acts, occurring sometimes in moments of passion, where the perpetrator consciously disregarded a risk in light of known circumstances. This often constitutes domestic violence. Reckless assaults

in Maine fit that congressional intent for § 922(g)(9), including the paradigm of a domestic assault as described by Senator Lautenberg. As the dissenting judges on the Ninth Circuit, concerned with a different federal statute, explained:

> "Domestic abusers may be drunk or otherwise incapacitated when they commit their crimes, and they may plea bargain down from a felony to a misdemeanor or from a statute that requires a *mens rea* of intentionality to one that can be satisfied by recklessness. But this does not alter the nature of domestic violence as a crime involving the use of force against someone in a domestic relationship . . . ."

Fernandez-Ruiz, 466 F.3d at 1139 (Wardlaw, J., dissenting).

Defendants' position assumes that a reckless act cannot be an act of domestic violence because it lacks volition. But that is not true. For example, suppose Maine convicts a husband for throwing a knife toward his wife, intending to instill fear rather than to cause physical injury, but actually striking her. The *mens rea* of the conviction would likely be recklessness: in light of the circumstances known to the husband, he consciously disregarded the risk of harm. Such a reckless assault can "subject one intimate partner to the other's control," *Castleman*, 134 S. Ct. at 1411, and is the type of conduct included in § 922(g)(9) even though the husband did not intend to cause bodily injury or offensive contact. Similarly, if Maine prosecutes and convicts a parent for assault for waving a lit cigarette near a child in anger, the cigarette touching and burning the child, that conviction in context may well be an act of domestic violence.

The defendants focus their analysis on assaults involving reckless causation of offensive physical contact, rather than bodily injury. We do not see why that distinction is material to the analysis here. The issue is whether § 922(g)(9) encompasses reckless uses of force, regardless of whether the use of force results in bodily injury or an offensive physical contact. If the husband's knife grazes his wife or harms her grievously, it is an assault all the same.[4]

As a practical matter, it is hard to identify a case of reckless assault in the domestic context that Maine would prosecute but that Congress did not intend to serve as a § 922(g)(9) predicate. *See James v. United States*, 550 U.S. 192, 208 (2007) (explaining that the categorical approach focuses on "the ordinary case," not "every conceivable factual offense covered by a statute"); *United States v. Fish*, 758 F.3d 1, 6 (1st Cir. 2014) ("[I]n assessing whether the elements of the candidate proposed as a predicate crime are overbroad, we need not consider fanciful, hypothetical scenarios."). Maine will not prosecute all "[m]inor uses of force." *Castleman*, 134 S. Ct. at 1412; *see Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (Evans, J., concurring) ("[P]eople don't get charged criminally for expending a newton of force against victims. [The defendant] actually beat his wife . . . ."). But some

---

[4] The dissent wrongly relies on our decision in *United States v. Bayes*, 210 F.3d 64 (1st Cir. 2000), for the proposition the federal assault statute requires deliberate action. *Id.* at 69 (citing 18 U.S.C. § 113(a)(5)). *Bayes* says that "it is sufficient to show the defendant deliberately touched another in a patently offensive manner without justification or excuse." *Id.* In deciding that the statue did not require specific intent, *Bayes* did not pass on whether recklessness would satisfy the statute. Further, the dissent relies on the rule of lenity, an argument not made by the defendants.

grabbing and slapping "accumulat[es] . . . over time," "subject[ing] one intimate partner to the other's control." *Castleman*, 134 S. Ct. at 1412. When it eventually "draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a 'misdemeanor crime of domestic violence.'" *Id.* After all, not all assaults will serve as § 922(g)(9) predicates, but only those occurring in the domestic context.

To be clear, we do not decide that, on the spectrum from negligence to intentional acts, recklessness is always closer to the latter. *Cf. Fernandez-Ruiz*, 466 F.3d at 1141-42 (Wardlaw, J., dissenting) ("Recklessness is a distinct *mens rea*, which lies closer to intentionality than to negligence."). We also do not decide that recklessness in the abstract is always enough to satisfy § 922(g)(9).[5] We decide only that the Maine definition is sufficiently volitional that it falls within the definition of "use of physical force" applied in § 922(g)(9). *See Booker*, 644 F.3d at 18.

C. *Our Recent Decision in* Carter *Does Not Help the Defendants*

In *United States v. Carter*, 752 F.3d 8 (1st Cir. 2014), we encountered similar facts to this case. We

---

[5] As recognized at 2 LaFave, *Substantive Criminal Law*, § 5.4 n.6, "usage of the term [recklessness] has not been consistent." *See, e.g., United States v. Meeks*, 664 F.3d 1067, 1070-71 & n.2 (6th Cir. 2012) (explaining that "recklessness" in Kentucky is a lower standard than "being aware of and consciously disregarding a substantial and unjustifiable risk"). As the dissent observes, while the Model Penal Code definition is similar to Maine's (though not identical), Puerto Rico's definition—until the new statute is in effect—has language quite different from the Maine statute.

remanded for the district court to determine whether the defendant had indeed been convicted of a reckless assault. The opinion noted that *Castleman* "casts doubt" upon *Booker*, but it explicitly did "not decide" the question before this court. *Id.* at 18 & n.11. Now, squarely presented with the issue and having reviewed *Castleman*, we resolve the question left open by *Carter*.

III.

The defendants make three constitutional arguments, none of which are successful.

First, the defendants renew their prior argument that § 922(g)(9) violates the Second Amendment as applied to them. They explicitly raise the argument only to preserve it, and for good reason: it is "foreclosed by binding precedent in this circuit." *Carter*, 752 F.3d at 13; *see Armstrong*, 706 F.3d at 7-8; *Booker*, 644 F.3d at 22-26.

Second, the defendants offer a "gloss" on their earlier argument. They suggest that *Castleman* held that the link between non-violent misdemeanors and domestic violence involving firearms is extremely tenuous, and they argue that such a tenuous link cannot support the law's constitutionality. To the contrary, *Castleman* explained that the link between non-violent misdemeanors and domestic violence involving firearms is "sobering," and hardly tenuous. 134 S. Ct. at 1409.

The defendants also raise an argument outside the scope of the Supreme Court's remand. They claim that § 922(g)(9) violates the Fifth Amendment, Sixth Amendment, and Ex Post Facto Clause because the determination that the predicate crime involves domestic violence is made at the time of the § 922(g)(9)

conviction, rather than at the time of the predicate conviction.

We have discretion to reexamine issues beyond the scope of the Supreme Court's specific remand order when "necessary to avoid extreme injustice." *United States v. Burnette*, 423 F.3d 22, 25 n.6 (1st Cir. 2005) (quoting *United States v. Estevez*, 419 F.3d 77, 82 (1st Cir. 2005)) (internal quotation mark omitted). But "[t]here is no injustice in refusing to reexamine a carefully considered decision based on the same arguments that we have already rejected." *Id.* at 25 n.6. The Supreme Court has already rejected arguments very similar to the defendants' in *United States v. Hayes*, 555 U.S. 415, 421 (2009).

The defendants argue that *Hayes* was implicitly overruled by a recent Supreme Court decision, *Descamps v. United States*, 133 S. Ct. 2276 (2013). *Hayes* held that the determination that an earlier conviction involved a domestic relationship is an element of § 922(g)(9), not the predicate conviction. 555 U.S. at 418. *Descamps* limited the extent to which courts can look at the facts underlying the predicate conviction to determine whether they fit the subsequent conviction, under the modified categorical approach. 133 S. Ct. at 2281-82. The defendants argue that, as in *Descamps*, the subsequent court may not evaluate the predicate conviction to determine a fact about it—here, whether it involved a domestic relationship.

We reject this argument. Whether the predicate conviction involved a domestic relationship is not a fact about the predicate conviction discerned through application of the modified categorical approach, in violation of *Descamps*. It is an element proved anew in the § 922(g)(9) proceeding.

IV.

The question before us is a narrow one. We are asked to decide whether a conviction for reckless assault against a person in a domestic relationship in Maine constitutes a federal "misdemeanor crime of domestic violence." Congress in passing the Lautenberg Amendment recognized that guns and domestic violence are a lethal combination, and singled out firearm possession by those convicted of domestic violence offenses from firearm possession in other contexts. *Castleman* recognizes as much.

For the reasons stated above, we *affirm* the judgments of guilt.

So ordered.

-Dissenting Opinion Follows-

TORRUELLA, *Circuit Judge*, Dissenting. The majority fails to adequately justify its departure from the Supreme Court's direction and the analogous decisions of our sister circuits. Indeed, the Supreme Court's message is clear. In *United States v. Castleman*, 134 S. Ct. 1405 (2014), the Court noted that we are the only outlying circuit on this question: our prior precedent is inconsistent with every other circuit court to consider the issue. *See id.* at 1414 n.8 (contrasting our past position with that of the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals, which have "uniformly held that recklessness is not sufficient" to "constitute a 'use' of force"). The Court then remanded the instant cases for reconsideration in light of *Castleman*, *see United States v. Armstrong*, 134 S. Ct. 1759 (2014), implicitly suggesting that we bring our holdings in line with the other federal circuit courts of appeals. We are obligated to heed the Supreme Court's direction. *See McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."). Not only are the Supreme Court's instructions mandatory, but the legal reasoning and analysis in the cases cited by the Court are also correct.

On remand, this case requires us to answer, at the very least, one question of statutory interpretation: whether a Maine conviction for the "reckless" causation of an "offensive physical contact" necessarily involves the "use or attempted use of physical force" as required to establish a "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9).

The majority fails to persuasively explain why, *in all cases*, the merely reckless causation of offensive physical contact categorically *must* involve the "use or attempted use of physical force," 18 U.S.C. § 921 (a)(33)(A), particularly in light of the host of cases strongly suggesting otherwise. As explained herein, these cases hold that the "use" of physical force requires the active or intentional employment of force, which cannot be satisfied by merely reckless conduct.

Confronting this question, we are not acting upon an empty stage; rather, we must start with the backdrop painted by the Supreme Court in *Castleman*, which is the basis for the instant remand. Indeed, the *Castleman* Court questioned whether the "merely reckless causation" of even bodily injury—much less offensive physical contact—could constitute the "use" of force, noting that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," because the "use" of force requires a greater degree of intentionality. *Castleman*, 134 S. Ct. at 1414 & n.8.

Although the majority opinion correctly observes that those circuit court cases involved different statutes, the operative language is nearly identical and the majority fails to persuasively explain why the result should be different here. All of the analogous cases involved the "use" of "force," and most interpreted 18 U.S.C. § 16. *See id.* at 1414 n.8 (listing cases). Several of these cases[6] analyzed § 16(a), which

---

[6] *See United States v. Torres-Villalobos*, 487 F.3d 607, 616-17 (8th Cir. 2007) (holding that Minnesota second-degree manslaughter can be committed recklessly without the intentional use of force, and therefore is not a crime of violence under § 16(a)); *Fernández-Ruiz v. Gonzales*, 466 F.3d 1121, 1123 (9th Cir. 2006) (holding that reckless conduct cannot constitute the "use" of force

defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). That language is materially indistinguishable, as relevant here, from the Lautenberg Amendment's definition of a "misdemeanor crime of domestic violence" as an offense that "has, as an element, the use or attempted use of physical force." 18 U.S.C. § 922(g)(9); *id.* § 921 (a)(33)(A). "[W]hen Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005).[7]

---

for purposes of § 16(a)); *García v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006) (reasoning that the "use" of "physical force" requires the *intentional* employment of physical force, and therefore holding that a New York second-degree reckless assault conviction is "beyond the scope" of § 16(a)).

[7] Moreover, the cases involving § 16(b) provide even stronger support for the defendants' position here, as § 16(b) involves language more susceptible than that of § 16(a) or the Lautenberg Amendment to a reading that encompasses reckless conduct. *Compare* 18 U.S.C. § 16(b) (defining a "crime of violence" as a felony that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), *with* Model Penal Code § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."). Yet most courts nonetheless have rejected arguments that § 16(b) can be satisfied by a predicate offense with a *mens rea* of recklessness. *See, e.g., Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003) ("[T]he verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) 'contemplates only *intentional* conduct and refers only to those offenses in which

The majority opinion concedes that this case presents a "close" question. *Ante*, at 3. I agree. Given the Supreme Court and circuit court cases interpreting similar statutes and holding that merely reckless conduct is insufficient to constitute the "use" of physical force, I believe that the rule of lenity also forecloses the defendants' convictions here. Indeed, it is a "familiar principle" that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'" towards the accused. *Skilling v. United States*, 561 U.S. 358, 410 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)).[8] The rule of lenity bars courts from giving the text of a criminal statute "a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Burrage v. United States*, 134 S. Ct. 881, 891 (2014). In my view, by permitting a conviction based on the reckless causation of offensive physical contact, the government and the majority seek to give the "use . . . of physical force" a meaning different from that phrase's ordinary meaning. The ordinary meaning of the "use" of physical force requires the *intentional*

---

there is a substantial likelihood that the perpetrator will *intentionally* employ physical force.'" (internal quotation marks omitted) (quoting *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001))).

[8] In addition to its acknowledgment that this is a "close" case, the majority's reliance on legislative history also suggests that the statutory text is ambiguous. *Cf. Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning."). Furthermore, the contrasting results reached by the First Circuit and our sister circuits on the interpretation of the phrase "use . . . of physical force" provide additional evidence of that statutory text's ambiguity.

employment of force, and not the merely accidental, negligent, or reckless use of such force. *Cf. Leocal v. Ashcroft*, 543 U.S. 1, 4 (2004) (giving an ordinary and natural reading to the phrase "'use . . . of physical force against the person or property of another,'" and holding that this phrase requires "a higher degree of intent than negligent or merely accidental conduct" (quoting 18 U.S.C. § 16(a))); *id.* (explaining that "'use' requires active employment," and reasoning that "a person would 'use . . . physical force against' another when pushing him . . . [but not] by stumbling and falling into him"); *García v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006) (holding that "the use . . . of physical force" requires the *intentional* employment of physical force). Moreover, given that the Supreme Court has stated that (1) "the merely reckless causation of bodily injury . . . may not be a 'use' of force," and (2) "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to constitute the "use" of force, *Castleman*, 134 S. Ct. at 1414 & n.8, I cannot see how the proper application of the rule of lenity permits affirmance of the defendants' convictions.

I express no opinion here on whether the "use" of physical force is satisfied by either the reckless causation of bodily injury or the intentional or knowing causation of offensive physical contact. Rather, I confine my inquiry to one subsumed offense under the Maine assault statutes: the reckless causation of offensive physical contact. Although the majority states that they fail to see why the distinction between "bodily injury" and "offensive physical contact" "is material to the analysis here," *ante*, at 22, I explain herein why that distinction matters. *See infra* Section II(B)(1). Namely, even if recklessness were a sufficient *mens rea* for purposes of bodily injury, a conviction

under the Lautenberg Amendment nonetheless cannot rest on the reckless causation of offensive physical conduct in Maine.[9]

The Supreme Court has stated that, under the Lautenberg Amendment, Congress classified as a "'misdemeanor crime of domestic violence'" "the type of conduct that supports a common-law battery conviction." *Castleman*, 134 S. Ct. at 1411. The Supreme Court has further explained that "the common-law crime of battery . . . consisted of the *intentional* application of unlawful force against the person of another." *Johnson v. United States*, 559 U.S. 133, 139 (2010) (emphasis added); *see also United States v. Bayes*, 210 F.3d 64, 69 (1st Cir. 2000) ("[T]he common law provided that an assault committed by way of a battery did not require an intent to cause or

---

[9] All of the examples cited by the majority—squeezing, shoving, a squeeze of the arm that causes a bruise, shooting a powerful handgun in the direction of a neighbor's home, driving a van to make contact with another vehicle and to push the victim's vehicle into heavy oncoming traffic, a husband throwing a knife towards his wife intending to instill fear but actually striking her, and waving a lit cigarette near a child in anger so that the cigarette touches and burns the child, *ante*, at 3, 12, 19-20, 21-22—involve *intentional* conduct that is reckless as to the result, which in nearly all of those examples is bodily injury. By contrast, the Maine statutes at issue here permits conviction for far less culpable conduct: merely *reckless* conduct that is also reckless as to the result of offensive physical contact. In so doing, the majority conflates *mens rea* as to the result with *mens rea* as to the underlying conduct that causes the result. It is this distinction that explains why common-law battery permits conviction for (1) intentional conduct that is reckless as to the result of bodily injury and (2) intentional conduct that is intentional as to the result of bodily injury or offensive touching, but does *not* permit conviction for (3) reckless conduct that is merely reckless as to the result of an offensive touching.

to threaten an injury as long as the defendant touched another in a *deliberately offensive* manner without a valid reason to do so.") (emphasis added); *State v. Rembert*, 658 A.2d 656, 658 (Me. 1995) (stating that "[u]npermitted and *intentional* contacts [are] actionable as an offensive contact") (emphasis added); *cf.* Wayne R. LaFave, 2 *Substantive Criminal Law* § 16.2(c)(2) n.32 (2d ed.) ("[W]ith the tort of battery an intention to injure or touch offensively is needed"); *Black's Law Dictionary* 182 (10th ed. 2014) (defining tortious battery as a "nonconsensual, *intentional*, and offensive touching of another without lawful justification") (emphasis added). To trigger a violation of the Lautenberg Amendment, therefore, the relevant precedent counsels that the offensive touch must be caused intentionally and not merely recklessly. By contrast, the Maine statutes at issue here permit conviction for recklessly causing an offensive touch.[10] Therefore, a conviction under either of the Maine assault statutes implicated here does not categorically establish a violation of the Lautenberg Amendment. Given that the record does not permit a conclusion that the defendants' Maine convictions rested on a subsumed offense that *does* constitute a violation of

---

[10] To recklessly cause an offensive physical contact in Maine, a person must consciously disregard a risk that his or her conduct will cause physical contact—something more than a mere touching—that a reasonable person would find to be offensive under the circumstances. *See* Me. Rev. Stat. tit. 17-A, § 35(3) (defining recklessness); *id.* § 207(1)(A) (simple assault); *id.* § 207-A(1)(A) (domestic violence assault). Therefore, to sustain a Maine conviction for this subsumed offense, the defendant need not intend that physical contact occur nor intend that the contact be considered offensive.

the Lautenberg Amendment, the federal convictions at issue here cannot stand.[11]

---

[11] Despite the foregoing, the majority opinion offhandedly rejects the relevance of the *mens rea* for battery under the common law. *See ante*, at 16 ("The parties agree that, under *Castleman*, the term 'use of physical force' also incorporates the common law *mens rea* for battery . . . . They disagree about whether reckless acts could or could not constitute batteries at common law, and each side marshals support for its view. We decline the parties' invitation to define the *mens rea* of a common law battery . . . .") (citations omitted). At the same time, the majority cites *Castleman* for the proposition that the "use" of physical force includes offensive contact, due to the common-law meaning of "force" for purposes of battery. *Id.* The majority opinion thus relies on the *actus reus* for battery under the common law, but simultaneously rejects the relevance of the accompanying *mens rea* for common-law battery. *See id.* In so doing, the majority fails to sufficiently justify its decision to "decline" the parties' "invitation" to consider the import of the *mens rea* of common-law battery to the question at bar. Such a decision requires justification, particularly because the Supreme Court in *Castleman* also extended an "invitation" for us to consider this issue when it explained that Congress intended to classify as a "'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *See Castleman*, 134 S. Ct. at 1411.

Nothing in *Castleman* suggests that the phrase "type of conduct" refers only to the *actus reus* for battery and not also the accompanying *mens rea*. Indeed, the contrary conclusion makes far more sense. If Congress meant to incorporate the common-law crime of battery, it most likely meant to incorporate both the *actus reus* and its accompanying *mens rea*. *See, e.g., United States v. Zhen Zhou Wu*, 711 F.3d 1, 18 (1st Cir. 2013) ("'In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.'" (quoting *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980))); *United States v. Cornelio-Pena*, 435 F.3d 1279, 1286 (10th Cir. 2006) (stating that "most crimes . require[] both *mens rea* and *actus reus*"); *cf. United States v. Freed*, 401 U.S. 601, 607-08 (1971) (explaining that when "Congress borrows terms of art" from the common law,

After giving careful consideration to the issues involved, engaging in the necessary statutory interpretation and legal analysis, and applying the relevant precedent, I heed the Supreme Court's direction and follow the lead of our sister circuits in disagreeing with the majority's conclusion. Therefore, I respectfully dissent.

I. LEGAL BACKGROUND

A. The Statutory Framework

1. The Lautenberg Amendment

The defendants here were charged with violating the Lautenberg Amendment to the Gun Control Act of 1968, now codified at 18 U.S.C. § 922(g)(9) (the "Lautenberg Amendment" or "§ 922(g)(9)"). Under the Lautenberg Amendment, it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(9). For these purposes, a "misdemeanor crime of domestic violence" is further defined in 18 U.S.C. § 921(a)(33)(A) as an offense that:

> (I) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, *as an element*, the *use or attempted use of physical force*, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the

---

"it presumably knows and adopts the cluster of ideas that were attached to each borrowed word" (internal quotation marks and citation omitted)).

> victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

Id. § 921(a)(33)(A) (emphases added).

2. The Relevant Maine Assault Statutes

The defendants argue that the relevant Maine assault statutes do not "ha[ve], as an element, the use or attempted use of physical force." *See id.* Under Maine law, a defendant is guilty of "domestic violence assault" if (1) the defendant violates the Maine simple assault provision, and (2) "the victim is a family or household member." *See* Me. Rev. Stat. tit. 17-A, § 207-A(1)(A).

Turning to the simple assault provision in the Maine Criminal Code, a person is guilty of "assault" if "[t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." *See* § 207(1)(A). Thus, there are six different, divisible permutations of the Maine simple assault statute, each of which can form the basis for a section 207 assault conviction. *United States v. Carter*, 752 F.3d 8, 17-18 (1st Cir. 2014) ("The Maine general-purpose assault statute is divisible into six permutations of subsumed offenses, based on the combination of one element from each of two categories: (1) *mens rea* ('intentionally, knowingly or recklessly'), and (2) actus reus ('causes bodily injury or offensive physical contact to another person')." (quoting § 207(1)(A))). These six subsumed offenses are illustrated in the following chart:

The six variants of the Maine simple assault statute:

Maine simple assault statute, Me. Rev. Stat. tit. 17-A, § 207(1)(A)		Actus Reus	
		. . . causes bodily injury.	. . . causes offensive physical contact.
Mens rea	Intentionally . . .	1. Intentionally causes bodily injury.	4. Intentionally causes offensive physical contact
	Knowingly .	2. Knowingly causes bodily injury.	5. Knowingly causes offensive physical contact.
	Recklessly . .	3. Recklessly causes bodily injury.	6. Recklessly causes offensive physical contact.

In Maine state court, Armstrong was convicted of Maine domestic-violence assault under section 207-A, and Voisine was convicted of Maine simple assault under section 207.[12] These prior convictions served as the predicate offenses for the defendants' § 922(g)(9) charges, which are the subject of the instant appeal. A simple assault statute lacking a domestic-relationship element (such as Voisine's prior offense of conviction in Maine) can nonetheless serve as the predicate

[12] Violation of either provision—the general assault offense or "domestic violence assault"—constitutes a "Class D" crime under the Maine Criminal Code, which is equivalent to a misdemeanor. *See State v. Allen*, 377 A.2d 472, 475 n.4 (Me. 1977) ("We therefore deem Class D and Class E crimes to be the Criminal Code equivalents of misdemeanors.").

offense for a misdemeanor crime of domestic violence, so long as the domestic-relationship element is proved in the subsequent federal prosecution. *See United States v. Hayes*, 555 U.S. 415, 418 (2009) (holding "that the domestic relationship, although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense").

B. The Categorical and Modified Categorical Approaches

Given the foregoing statutory framework, we must analyze whether the elements of the Maine assault statute necessarily fulfill the requirements of the Lautenberg Amendment. In cases such as this—where a court must decide whether a prior conviction for an earlier offense (like assault) satisfies one of the elements of the offense in a subsequent prosecution (here, for example, whether the earlier offense "has, as an element, the use . . . of physical force," 18 U.S.C. § 921(a)(33)(A))—the court determines whether it is appropriate to apply the categorical approach or the modified categorical approach.

1. The Categorical Approach

In *Taylor v. United States*, 495 U.S. 575, 600 (1990), the Supreme Court described the categorical approach, under which courts "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *See also United States v. Dávila-Félix*, 667 F.3d 47, 56 (1st Cir. 2011) (same). If the "statutory definition" of the prior offense *necessarily* meets the requirements of the subsequent offense at issue, then the court can determine that a conviction for the prior offense *categorically* constitutes a valid predicate offense for

purposes of the later prosecution. *See Castleman*, 134 S. Ct. at 1414.

2. The Modified Categorical Approach

Some statutes, like the Maine assault statutes at issue here, are "divisible": they "set[] out one or more elements of the offense in the alternative." *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). For these statutes, some permutations or variants of the subsumed offenses may categorically meet the requirements of the subsequent offense, whereas others may not. Accordingly, for these divisible statutes, courts may apply the "modified categorical approach" to determine which variant or subsumed offense formed the basis for the prior conviction, and thus whether that prior conviction can serve as a valid predicate offense for the subsequent prosecution. *See Castleman*, 134 S. Ct. at 1414. Under this approach, a court may "consult[ ] the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms"—in order to "determine which statutory phrase was the basis for the conviction" under such a divisible statute. *Johnson*, 559 U.S. at 144. These documents are often called "*Shepard* documents," after *Shepard v. United States*, 544 U.S. 13 (2005) (plurality opinion). *See, e.g., Carter*, 752 F.3d at 19-20 & 19 n.12.

3. Application

Under established precedent not called into doubt by *Castleman* and not challenged here, certain subsumed offenses under the Maine assault statutes (such as the intentional or knowing causation of bodily injury) are unequivocally valid predicate offenses for

the Lautenberg Amendment. *See Castleman*, 134 S. Ct. at 1415 ("It is impossible to cause bodily injury without applying force in the common-law sense," and "the knowing or intentional application of force is a 'use' of force."). If the *Shepard* documents showed that the defendants' prior assault convictions were for those particular subsumed offenses, for example, then we would be able to apply the modified categorical approach and affirm the defendants' Lautenberg Amendment convictions without reaching the recklessness issue. *See Carter*, 752 F.3d at 18 n.11 (reasoning that under the modified categorical approach, if the *Shepard* documents showed that the defendant's prior Maine conviction was for intentional or knowing conduct, then the court could affirm his conviction under the Lautenberg Amendment). The parties agree, however, that the *Shepard* documents for Armstrong's and Voisine's underlying Maine convictions are inconclusive and do not reveal which variants of the Maine assault statutes served as the bases for their convictions. Therefore, the modified categorical approach cannot resolve this appeal.

Rather, we must apply the categorical approach to determine whether the statutory definitions of the Maine assault provisions necessarily include the "use or attempted use of physical force." *See* 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9); *see also Castleman*, 134 S. Ct. at 1414. Under the categorical approach, if any one of the six variants of the Maine assault statute does not necessarily constitute the "use . . . of physical force," then the defendants' convictions must be reversed. Put differently, to affirm the defendants' convictions under the categorical approach, *all* of the subsumed offenses under the Maine statute must have the "use or attempted use of physical force" as an element. 18 U.S.C. §§ 921(a)(33)(A); *see also United*

States v. Holloway, 630 F.3d 252, 257 (1st Cir. 2011) (stating that under the categorical approach, "the [prior] conviction may only serve as a predicate offense if *each* of the possible offenses of conviction would qualify" as individually satisfying the offense in the subsequent prosecution (citing *Shepard*, 544 U.S. at 26)). The defendants focus their argument on the sixth and least severe subsumed offense: the "reckless" causation of "offensive physical contact." Therefore, we must apply the governing precedent to decide whether this statutory definition necessarily involves the "use . . . of physical force."

C. The Supreme Court's Decisions in *Leocal* and *Johnson*

The Supreme Court's opinions in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *Johnson v. United States*, 559 U.S. 133 (2010), provided foundational reasoning for subsequent cases relevant to this appeal. In both of these cases, the Supreme Court engaged in statutory interpretation to determine whether the offenses underlying prior state convictions had, as an element, the "use" of physical force as required for purposes of a subsequent federal proceeding.

1. *Leocal*

In *Leocal*, the Supreme Court examined a similar question to that facing us today, regarding parallel language in the statutory definition of a "crime of violence" under 18 U.S.C. § 16(a). Under that statute, a "crime of violence" includes "an offense that has as an element the *use, attempted use, or threatened use of physical force* against the person or property of another." 18 U.S.C. § 16(a) (emphasis added). The petitioner in *Leocal* had previously been convicted in Florida state court for driving under the influence of

alcohol (DUI) and causing serious bodily injury. *Leocal*, 543 U.S. at 3. The Supreme Court held that the petitioner's DUI conviction was not a crime of violence under 18 U.S.C. § 16. *Id.* at 4. In so holding, the Court explained that "'use' requires active employment," reasoning that "a person would 'use . . . physical force against' another when pushing him . . . [but not] by stumbling and falling into him." *Id.* Giving the operative phrase in 18 U.S.C. § 16(a) its ordinary and natural reading, in context, the *Leocal* Court held that the "'use . . . of physical force against the person or property of another'" requires "a higher degree of intent than negligent or merely accidental conduct." *Id.* (quoting 18 U.S.C. § 16(a)). The Court also interpreted parallel language in 18 U.S.C. § 16(b), giving that language "an identical construction" and "requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 11.

Additionally, the Court considered the fact that it was "ultimately . . . determining the meaning of the term 'crime of violence.'" *Id.* It reasoned that "[t]he ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Id.* Therefore, the Court concluded that "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.* Importantly for the instant case, the *Leocal* Court held only that negligent and accidental conduct did not constitute the "use" of force and thus a crime of violence under 18 U.S.C. § 16; the Court did not reach the question whether reckless conduct would be sufficient. *Id.* at 13 ("This

case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16.").

2. *Johnson*

In *Johnson*, the Supreme Court considered a related question: "whether the Florida felony offense of battery by '[a]ctually and intentionally touch[ing]' another person, Fla. Stat. § 784.03(1)(a), (2) (2003), 'has as an element the use . . . of physical force against the person of another,' 18 U.S.C. § 924(e)(2)(B)(I), and thus constitutes a 'violent felony' under the Armed Career Criminal Act, § 924(e)(1)." *Johnson*, 559 U.S. at 135 (alterations in original). The Court observed that "the element of 'actually and intentionally touching' under Florida's battery law is satisfied by any intentional physical contact, 'no matter how slight.'" *Id.* at 138 (quoting *State v. Hearns*, 961 So. 2d 211, 218 (Fla. 2007)). Even "[t]he most 'nominal contact,' such as a 'ta[p] . . . on the shoulder without consent,'" is sufficient to constitute a violation of the Florida law. *Id.* (second and third alterations in original) (quoting *Hearns*, 961 So. 2d at 219).

In determining the definition of "physical force" under the Armed Career Criminal Act ("ACCA"), the Court sought to give the phrase "its ordinary meaning" while keeping in mind the context of its inquiry: defining the statutory category of violent felonies. *Id.* at 138-40. In that context, the Court thought "it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. The *Johnson* Court explicitly limited its holding to the ACCA,

asserting that its decision would not extend to the Lautenberg Amendment. *See id.* at 143-44 ("We have interpreted the phrase 'physical force' only in the context of a statutory definition of 'violent felony.' We do not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence. The issue is not before us, so we do not decide it.").

D. Pre-*Castleman* First Circuit Precedent: *Nason*, *Booker*, *Armstrong I*, and *Voisine I*

Prior to the Supreme Court's decision in *Castleman*, the defendants' arguments were squarely foreclosed by First Circuit precedent; it is this precedent that the Supreme Court has instructed us to reconsider.

In *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001), which also considered the interplay between the Maine simple assault statute and the Lautenberg Amendment, we held that the *actus reus* of "offensive physical contact" necessarily involved the "use or attempted use of physical force," *id.* at 11-12, 21. Synthesizing the definitions of "physical force" from *Black's Law Dictionary* and other dictionaries, we determined that "physical force may be characterized as power, violence, or pressure directed against another person's body." *Id.* at 16. We thus held that § 922(g)(9) does not require that the predicate offense involve "bodily injury," but rather can be satisfied by "any physical force"—including offensive physical contact—"regardless of whether that force resulted in bodily injury or risk of harm." *Id.* at 16-18. Therefore, *Nason* established that either *actus reus* prong of the Maine assault statute—bodily injury or offensive physical contact—could serve as a valid predicate conviction for purposes of § 922(g)(9). *Id.* at 21 ("[B]oth [*actus reus*] variants of assault regulated under

Maine's general-purpose assault statute necessarily involve the use of physical force.").

Whereas *Nason* focused on the *actus reus* variants of the Maine assault statute for purposes of the Lautenberg Amendment, we later focused on the *mens rea* variants in *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011). In *Booker*, we rejected the argument that only an intentional offense could constitute a misdemeanor crime of domestic violence under § 922(g)(9). *Id.* at 13-14. The appellants in *Booker* sought to rely on the Supreme Court's decisions in *Leocal* and *Johnson*, analogizing to the definition of "crime of violence" under 18 U.S.C. § 16 and the definition of "violent felony" under the ACCA, 18 U.S.C. § 924(e). *Id.* at 18-19. We held that those other statutes were not sufficiently analogous to dictate the result in *Booker*, reasoning that, for example, "[w]hereas the ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims—those in a relationship with a perpetrator of domestic violence." *Id.* at 21. We thus turned to the "plain, unambiguous language of § 922(g)(9)," finding that "the statutory definition of 'misdemeanor crime of domestic violence' does not prescribe an intentional *mens rea*." *Id.* (quoting 18 U.S.C. § 922(g)(9)). Therefore, we held "that an offense with a *mens rea* of recklessness may qualify as a 'misdemeanor crime of domestic violence' under § 922(g)(9)." *Id.* (quoting 18 U.S.C. § 922(g)(9)).

On the initial appeal in this case, *United States v. Armstrong*, 706 F.3d 1, 5 (1st Cir. 2013) ("*Armstrong I*"), *vacated*, 134 S. Ct. 1759 (2014), we considered Armstrong's arguments that the Lautenberg Amendment's prohibition on gun ownership does not

apply to non-violent offensive physical contact. We found the defendant's argument on this issue to be squarely foreclosed by our prior decisions in *Nason* and *Booker*. *Id.* at 2 (citing *Booker*, 644 F.3d 12; *Nason*, 269 F.3d 10). On that basis, we rejected Armstrong's statutory interpretation arguments and affirmed the decision of the district court. *Id.* at 2-6, 8. That same day, we issued an opinion in *United States v. Voisine*, 495 F. App'x 101 (1st Cir. 2013) (per curiam) ("*Voisine I*"), *vacated sub nom. Armstrong v. United States*, 134 S. Ct. 1759 (2014). In a per curiam opinion, we stated that Voisine had raised "the exact same arguments" as those raised in *Armstrong I*. *Id.* Because there were "no pertinent factual differences distinguishing" *Voisine I* from *Armstrong I*, we incorporated Armstrong I's reasoning into the *Voisine I* per curiam opinion and affirmed the district court's decision. *Id.* at 102. Both defendants appealed our decisions in to the Supreme Court.

E. *Castleman* and its Aftermath

1. The Supreme Court's *Castleman* Opinion

Approximately one year later, while the petitions for writs of certiorari were pending in *Armstrong I* and *Voisine I*, the Supreme Court issued its opinion in *Castleman*, 134 S. Ct. 1405. The defendant in *Castleman* had pleaded guilty to a Tennessee offense for "intentionally or knowingly caus[ing] bodily injury to" the mother of his child. *Id.* at 1408-09. After federal authorities subsequently learned that he was selling firearms on the black market, Castleman was indicted on two counts of violating the Lautenberg Amendment. *Id.* at 1409. He argued that the Tennessee statute did not have the use, or attempted use, of physical force as an element of the offense. *Id.* (citing 18 U.S.C. § 921(a)(33)(A)(ii)). The Sixth Circuit

affirmed the dismissal of Castleman's convictions on the § 922(g)(9) counts, holding that the Tennessee conviction was not a valid predicate offense because Castleman might have been convicted for "'caus[ing] a slight, nonserious physical injury with conduct that cannot be described as violent.'" *See id.* at 1409–10 (quoting *United States v. Castleman*, 695 F.3d 582, 590 (6th Cir. 2012)). The Supreme Court reversed, reasoning that Castleman had pleaded guilty to intentionally or knowingly causing bodily injury, which "necessarily involves the use of physical force." *Castleman*, 134 S. Ct. at 1414.

The Court explained that "physical force" for purposes of § 922(g)(9) encompasses "the common-law meaning of 'force'—namely, offensive touching." *Id.* at 1410. The Court explained that "'[d]omestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context"—acts like slapping, shoving, pushing, grabbing, hair-pulling, and spitting. *Id.* at 1411 & n.5.

The *Castleman* Court further explained that there are two main categories of assault or battery laws generally used to prosecute domestic abusers: "those that prohibit both offensive touching and the causation of bodily injury, and those that prohibit only the latter." *Id.* at 1413. Interpreting "physical force" to exclude a mere "offensive touching" would have rendered the Lautenberg Amendment "ineffectual in at least 10 States—home to nearly thirty percent of the Nation's population—at the time of its enactment." *Id.* (footnote omitted). Therefore, the Court held that the "physical force" requirement is satisfied "by the degree of force that supports a common-law battery conviction"—including an offensive touching. *Id.*

The Court considered whether it could apply the "categorical approach" articulated in *Taylor*, 495 U.S. 575, to resolve the issue, asking if the elements of the Tennessee statute necessarily met the requirements of § 922(g)(9). *Castleman*, 134 S. Ct. at 1414. If the answer were in the affirmative, then the Court could conclude that "a domestic assault conviction in Tennessee categorically constitutes a 'misdemeanor crime of domestic violence.'" *Id.*

Expressing skepticism regarding such a categorical conclusion, the Court stated that "[i]t does not appear that every type of assault defined by [the Tennessee statute] necessarily involves 'the use or attempted use of physical force, or the threatened use of a deadly weapon.'" *Id.* at 1413–14 (quoting 18 U.S.C. § 921(a)(33)(A)). For example, the Court reasoned that under the Tennessee statute, "[a] threat . . . may not necessarily involve a deadly weapon, and the merely reckless causation of bodily injury . . . may not be a 'use' of force." *Id.* at 1414. The Court noted that in *Leocal* it had "reserved the question whether a reckless application of force could constitute a 'use' of force," *id.* at 1414 n.8 (citing *Leocal*, 543 U.S. 1), but emphasized that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," *id.* (contrasting our holding in *Booker*, 644 F.3d 12, with the decisions of ten of our sister courts of appeals: the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits). The Court declined to hold that a conviction under the Tennessee statute categorically constitutes a misdemeanor crime of domestic violence for purposes of § 922(g)(9) *See id.* at 1414.

On the heels of its *Castleman* opinion, the Supreme Court vacated our prior decisions in *Voisine I* and

Armstrong I, and it remanded those two cases for reconsideration in light of its decision in *Castleman*. *See Armstrong I*, 134 S. Ct. 1759 ("Judgment vacated, and case remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *United States v. Castleman*, [134 S. Ct. 1405] (2014)."). There is little disagreement that this remand order calls for us to consider the impact of *Castleman's* Footnote Eight on our prior precedent, particularly *Booker* and *Nason*. In that footnote, the Supreme Court contrasted our *Booker* holding with the decisions of ten of our sister circuits, noting that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to "constitute a 'use' of force." *Id.* at 1414 n.8.

2. The First Circuit's *Carter* Opinion

In the wake of *Castleman* and the Supreme Court's remand of the instant cases, we issued an opinion in *United States v. Carter*, 752 F.3d 8 (1st Cir. 2014). Among other arguments, the defendant in that case, Wayne Carter, raised similar issues to those examined in *Armstrong I*. *Id.* at 9-10. Carter had been convicted in 1997 of a misdemeanor assault in Maine, after his live-in girlfriend at the time, Annie Eagan, told police officers that Carter spit in her face and shoved her right shoulder. *Id.* at 10. Eagan reported that she was not hurt, that she did not want Carter arrested or charged with an offense, and that she only wanted him removed from the house. *Id.* at 10-11. Nonetheless, the Maine state prosecutor charged Carter under Maine's general-purpose assault statute, to which Carter pleaded guilty and was sentenced to time served: thirty days in jail. *Id.* at 11.

Approximately thirteen years later, in 2010, Carter obtained a loan by pawning a rifle that he had

inherited from his dead father. *Id.* at 10. A records check and further investigation in connection with his pawning activities revealed Carter's prior misdemeanor assault conviction. *Id.* The pawn shop's records showed that Carter had pawned and redeemed three separate rifles multiple times between 2007 and 2010. *Id.* at 11. All of the rifles were inherited from his father. *Id.* at 11 n.2. "The firearms were kept in a locked cabinet at his mother's house, and Carter only physically possessed the rifles in connection with pawning them." *Id.* Based on the foregoing, Carter was charged in a one-count indictment for violating the Lautenberg Amendment's prohibition on gun possession by those convicted of a misdemeanor crime of domestic violence. *Id.* at 11. After entering a conditional guilty plea, reserving his right to appeal, Carter was sentenced by the district court to be imprisoned for twelve months and one day—a downward variance from the bottom of the Sentencing Guidelines range: eighteen months. *Id.* at 9, 12. He then appealed, arguing, among other things, that the commission of simple assault by recklessly causing offensive physical contact does not constitute the "use . . . of physical force" as required to establish a misdemeanor crime of domestic violence under the Lautenberg Amendment. *Id.* at 10.

On appeal, we noted that although this argument was previously foreclosed by our holding in *Booker*, "the Supreme Court's recent decision in *Castleman* casts doubt upon this holding." *Id.* at 18 (citing *Castleman*, 134 S. Ct. at 1414 & n.8). In support of that assertion, we cited the Supreme Court's statements that "'the merely reckless causation of bodily injury under [the Tennessee assault statute] may not be a "use" of force,'" *id.* (alteration in original) (quoting *Castleman*, 134 S. Ct. at 1414), and that "'the Courts

of Appeals have almost uniformly held that recklessness is not sufficient' to 'constitute a "use" of force,'" *id.* (quoting *Castleman*, 134 S. Ct. at 1414 n.8). Although *Castleman* had not directly overruled our prior decision in *Booker*, we noted that these statements from the Supreme Court provided a "'sound reason' for thinking that the *Booker* panel might well 'change its collective mind' in light of *Castleman*." *Id.* at 18 n.11 (quoting *United States v. Rodríguez-Pacheco*, 475 F.3d 434, 442 (1st Cir. 2007)).

Despite the Supreme Court's statements in *Castleman* calling into question our prior precedent on this question, it was unnecessary in *Carter* to answer the recklessness issue, because *Carter* potentially could have been resolved via the modified categorical approach: the underlying *Shepard* documents might have "ultimately show[n] that Carter's conviction was under one of the other two mens-rea prongs of the statute—'intentionally' or 'knowingly.'" *Id.* We thus observed that under *Castleman*, "the validity of Carter's § 922(g)(9) conviction may depend on which mens-rea prong of the Maine general-purpose assault statute served as the basis for his guilty plea and conviction." *Id.* at 18. Examining the record for *Shepard* documents that could determine which variant of the Maine assault statute was the basis for Carter's conviction, we found the record incomplete and undeveloped: it was unclear whether such documents existed. *See id.* at 20-21 ("It is not clear . . . whether there are any other 'approved' *Shepard* documents or comparable judicial records available with respect to Carter's prior assault conviction. . . . [T]he record is insufficiently developed to determine which variant of the Maine general-purpose assault statute served as the basis for Carter's conviction."). Accordingly, we "remand[ed] the case to the district

court to allow the parties to further develop the record on this issue," consistent with the Supreme Court's opinion in *Castleman*. *Id.* at 21. In so doing, we reserved the question presented by the Supreme Court's vacatur of *Armstrong I* and *Voisine I* in light of *Castleman*, allowing us to squarely address that issue in the instant remand.

3. District Courts' Application of *Castleman* and *Carter*

To date, three different district court judges in the First Circuit have applied the reasoning of *Castleman's* Footnote Eight regarding these issues; all three opinions concluded that a recklessly committed Maine assault does not necessarily involve the "use" of physical force and thus is not categorically a misdemeanor crime of domestic violence. *United States v. Sales*, No. 2:13-CR-137-NT, 2014 WL 3405658 (D. Me. July 11, 2014); *United States v. Carter*, No. 2:10–cr–00155–GZS, 2014 WL 3345045 (D. Me. July 8, 2014); *United States v. Hines*, No. 1:12–cr–00204–JAW, 2014 WL 1875164 (D. Me. May 9, 2014). Each of these three cases is examined below, in the order that they were decided.

a. Hines

The first district court case to apply the decisions in *Castleman* and *Carter* to these issues was *Hines*, 2014 WL 1875164. The defendant in *Hines* had pleaded guilty in Maine state court to violating the domestic violence assault statute; the *Shepard* documents revealed no further details regarding the conduct underlying this offense. *Id.* at *2. Before the district court, the defendant argued, among other things, that a *mens rea* of recklessness could not satisfy the "use of

force" requirement under the Lautenberg Amendment. *Id.* at *4. The district court noted that pre-*Castleman* First Circuit precedent had previously foreclosed this argument, and "[t]he question is how *Castleman* affects the resolution of the issues [the defendant] has raised." *Id.* at *7.

Examining *Castleman's* Footnote Eight, the court observed that "[t]his footnote, which cited ten circuit courts as concluding that reckless conduct did not constitute 'use of physical force,' strongly hinted that the First Circuit's *Booker* decision was an outlier." *Id.* at *8. The district court then considered the Supreme Court's vacatur of *Armstrong I* in light of *Castleman*. *Id.* The court explained that "[r]eading Supreme Court tea leaves is chancy, but the First Circuit decision in *Armstrong I* was consistent with *Castleman* except for the Circuit Court's brief recklessness analysis." *Id.* Thus, the court found that "[i]t is a short logical step to conclude that the reason the Supreme Court vacated the First Circuit decision in *Armstrong I* was to pull the First Circuit in line with the other ten circuit courts in the recklessness analysis." *Id.* Accordingly, on the basis of *Castleman*, the vacatur of *Armstrong I*, and *Carter*, the district court concluded that it is "questionable" whether a Maine conviction for domestic assault—"without more"—qualifies as a valid predicate conviction for the Lautenberg Amendment. *Id.* at *9.

b. Carter

Following our remand instructions in *Carter*, the district court permitted the parties to further develop the record with *Shepard* documents to determine which subsumed variant of the Maine assault statute formed the basis of Carter's prior state misdemeanor conviction. *Carter*, 2014 WL 3345045, at *6. The only

additional document available was a transcript of Carter's plea colloquy in Maine state court, in which Carter's attorney stated that "'discovery shows that this was no more than a push on the right shoulder, that it was nothing more serious than that.'" *Id.* at *7. Accordingly, on the basis of all the *Shepard* documents, the district court was "unable to identify the offense of Carter's conviction." *Id.*

The district court cited *Hines*, including the statement that "'[i]t is a short logical step to conclude that the reason the Supreme Court vacated the First Circuit decision in [*Armstrong I*] was to pull the First Circuit in line with the other ten circuit courts in the recklessness analysis.'" *Id.* at *5 (quoting *Hines*, 2014 WL 1875164, at *8). The court further observed that "while the statement in *Castleman* was via dictum in a footnote, 'it is much more than an offhand comment. . . . [C]arefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative.'" *Id.* at *6 (quoting *Crowe v. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004)) (internal quotation marks omitted). Stating that it "cannot ignore the guidance of the Supreme Court and the First Circuit in *Castleman*, *Armstrong* and *Carter*," the district court concluded that "Carter's conviction may only stand if it was premised on more than accidental, negligent or reckless conduct." *Id.* Faced with the absence of any *Shepard* documents permitting such a finding, the district court granted Carter's motion to dismiss the indictment, holding that his 1997 conviction could not serve as a predicate misdemeanor for the Lautenberg Amendment. *Id.* at *7.

c. Sales

Sales, 2014 WL 3405658, is the third and, to date, final district court case to apply *Castleman* and *Carter*. The defendant in that case, Kenneth Sales, had pleaded guilty in Vermont state court to one count of "assault-simple-mutual affray" because he "engaged in a fight or scuffle entered into by mutual consent." *Id.* at *1 (citing Vt. Stat. Ann. tit. 13, § 1023). In that plea colloquy, the Vermont Superior Court judge explained that Sales "recklessly caused bodily injury to a person, and that it was in a fight or scuffle entered into by mutual consent." *Id.* The judge further explained that "there was a physical altercation between [Sales] and [his girlfriend] . . . and that in the course of it [he] at least recklessly . . . caused bodily injury to her, being . . . a scratch or a sort of cut that she received." *Id.* Explaining the *actus reus* of bodily injury, the judge stated that "[b]odily injury is any sort of injury, it doesn't have to be a broken bone or anything like that, it can be a bruise, a cut, kind of anything that hurts." *Id.* With respect to the *mens rea*, the judge explained that "[r]ecklessly means you did not have to intend a particular result, but you engaged in conduct that was not what a reasonable person would do in these circumstances, and had a very high risk that the result would happen." *Id.* Subsequent to this assault conviction in Vermont state court, Sales was charged with a violation of the Lautenberg Amendment in federal district court in Maine. *Id.* at *2.

The district court reviewed the governing precedent, including *Castleman*, *Carter*, and the previous two district court decisions described above, *Hines* and *Carter*. *Id.* at *2-3. Observing that the *Castleman* court emphasized *Leocal's* holding that "use" requires active employment, the district court further

highlighted that "[t]he Supreme Court also pointed out that *Booker* is out of step with other circuit courts that have held that recklessness is not sufficient to constitute a 'use' of force." *Id.* at *3 (citing *Castleman*, 134 S. Ct. at 1414 n.8). Accordingly, the district court opined that "the Supreme Court's remand of Armstrong 'in light of *Castleman*' is fairly construed as a directive to the First Circuit to reconsider whether an assault committed recklessly is sufficient to meet the federal definition of a misdemeanor crime of domestic violence." *Id.* The district court agreed with Chief Judge Woodcock that "'[r]eading Supreme Court tea leaves is chancy,'" *id.* at *4 (quoting *Hines*, 2014 WL 1875164 at *8), but concluded that "it is hard to miss the message here," *id.* The court observed that the First Circuit may yet "decide that recklessness is sufficient," but that it would be "presumptuous" for the district court "to make that determination." *Id.* Therefore, the district court dismissed the defendant's indictment. *Id.*

II. DISCUSSION

On remand, the relevant inquiry is whether the "reckless" causation of "offensive physical contact" under Maine law necessarily constitutes the "use or attempted use of physical force" for purposes of the Lautenberg Amendment. *Compare* Me. Rev. Stat. tit. 17-A, § 207, *with* 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9). As a matter of statutory interpretation, we need to compare the text of each side of the equation: (a) the definition of the "reckless" causation of "offensive physical conduct" under the Maine assault statutes; and (b) the definition of the "use . . . of physical force" under the federal Lautenberg Amendment. The former inquiry is a question of Maine state law, while the latter is a question of federal law. Applying the

relevant precedent, this discussion concludes that the reckless causation of offensive physical contact in Maine does not necessarily constitute the "use" of physical force and thus is not categorically a "misdemeanor crime of domestic violence" under the Lautenberg Amendment.

A. The Meaning of the "Reckless" Causation of "Offensive Physical Contact" Under Maine Law

1. The Meaning of "Reckless"

Under the applicable definition in the Maine Criminal Code, "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result." Me. Rev. Stat. tit. 17-A, § 35(3)(A). Additionally, "the disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." *Id.* § 35(3)(C).

The majority opinion describes this definition of "recklessness" as involving "a substantial amount of deliberateness and intent." *Ante*, at 18. To support this assertion, the majority follows the government's brief in emphasizing that the definition requires that a person "consciously" disregard the risk involved, and that this disregard involves a "gross deviation" from the standard of reasonable and prudent conduct. *Id.* at 18-19. Relying on this language, the government argues that "recklessness lies rather close to 'knowingly'" on the "volitional scale," and that recklessness "is arguably part and parcel of 'willfully.'" Continuing, the government asserts that "[r]ecklessly is more akin to deliberately or knowingly." I disagree.

Contrary to the claim that the Maine definition of recklessness involves "a substantial amount of deliberateness and intent," the Maine definition is in fact a textbook definition of recklessness, falling squarely within the standard definitions of recklessness in various jurisdictions and as defined by multiple authorities. Indeed, the Maine definition is materially indistinguishable from the definition of recklessness in the Model Penal Code. *Cf.* Model Penal Code § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."). This Model Penal Code definition contains all of the elements and precise language highlighted by the majority as supposedly establishing "a substantial amount of deliberateness and intent." *Cf. ante*, at 18-19 ("*consciously*" disregards, "nature and *purpose* of the person's conduct and the circumstances *known* to [him]," and "gross deviation" from the standard of care) (emphases supplied by the majority).

As revealed in the chart below, the Maine definition of recklessness is also consistent with the equivalent definitions in the Model Penal Code, *Black's Law Dictionary*, and the majority of First Circuit jurisdictions.

Source, Authority, or Jurisdiction	Definition
Model Penal Code § 2.02(2)(c) (emphases added)	"Recklessly. A person acts recklessly with respect to a material element of an offense when he *consciously disregards* a *substantial and unjustifiable risk* that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a *gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation."
Black's Law Dictionary 1462 (10th ed. 2014) (emphases added)	"reckless, adj. . . . Characterized by the creation of a *substantial and unjustifiable risk of harm* to others and by a *conscious (and sometimes deliberate) disregard* for or indifference to that risk; heedless; rash. Reckless conduct is much more than mere negligence: it is a *gross deviation* from what a reasonable person would do. *See* recklessness. . . . Cf. careless; wanton . . . ."
Black's Law Dictionary 1462 (10th ed. 2014) (emphasis added)	"recklessness, n. . . . 1. Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and *consciously takes the risk*. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing. 2. The state of mind in which a person does

	not care about the consequences of his or her actions.—Also termed heedlessness. Cf. wantonness."
Maine	"A person acts recklessly with respect to a result of the person's conduct when the person *consciously disregards* a risk that the person's conduct will cause such a result. . . . [T]he disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a *gross deviation* from the standard of conduct that a reasonable and prudent person would observe in the same situation." Me. Rev. Stat. tit. 17-A, § 35(3)(emphases added) (subsections defining "recklessly" under the Maine Criminal Code section setting out "Definitions of culpable states of mind"); *see also Stein v. Me. Criminal Justice Acad.*, 95 A.3d 612, 618 (Me. 2014) (applying the foregoing statutory definitions of "recklessly" to the Maine general-purpose assault statute, § 207(1)(A)).
Massachusetts	"Reckless failure to act involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another." *Sandler v. Commonwealth*, 419 Mass. 334, 644 N.E.2d 641, 643 (Mass. 1995). "[R]eckless conduct involves a degree of risk and a voluntary taking of that risk so marked that, compared to negligence, there is not just a difference in degree but also a

	difference in kind." *Id.*, 644 N.E.2d at 644. "To prove reckless battery, the Commonwealth must establish '(1) that the defendant's conduct involve[d] a high degree of likelihood that substantial harm will result to another, or that it constitute[d] . . . disregard of probable harmful consequences to another and (2) that, as a result of that conduct, the victim suffered some physical injury.'" *United States v. Holloway*, 630 F.3d 252, 261 (1st Cir. 2011) (quoting *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 450 N.E.2d 1100, 1102–03 (Mass. App. Ct. 1983)). "To constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm." *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902, 910 (Mass. 1944) (internal quotation marks omitted).
New Hampshire	"'Recklessly.' A person acts recklessly with respect to a material element of an offense when he is aware of and *consciously disregards* a *substantial and unjustifiable risk* that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the *circumstances known*

	to him, its disregard constitutes a *gross deviation* from the conduct that a law-abiding person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of having voluntarily engaged in intoxication or hypnosis also acts recklessly with respect thereto." N.H. Rev. Stat. § 626:2 (II)(c) (emphases added).
Puerto Rico	*Old:* "[W]hen the actor has foreseen or is conscious that there exists a high probability that his conduct will produce the criminal act." P.R. Laws Ann. tit. 33, § 5035 (2012) (unofficial translation supplied). *New:* "A person acts recklessly when he is conscious that his conduct generates a substantial and unjustified risk that the legally prohibited result or circumstance will be produced." 2014 P.R. Laws No. 246, art. 12 (enacting S.B. 1210, and modifying art. 22(3) of Law 146-2012) (unofficial translation supplied).[13]

[13] The situation in Puerto Rico merits some further explanation. Historically, under Puerto Rico's Penal Code, there were two culpable mental states: "intent" and "negligence." *See* P.R. Laws Ann. tit. 33, §§ 4650-4652 (2004). The definition of "intent" included three variants, generally corresponding to the concepts of "purposeful," "knowing," and "reckless" conduct under the Model Penal Code. *See id.* § 4651; *see also* Dora Nevárez-Muñiz, *Recodification of Criminal Law in a Mixed Jurisdiction: The Case of Puerto Rico*, 12.1 Elec. J. Comp. L. 16 (May 2008), *available at* http://www.ejcl.org/121/art121-14.pdf. In the 2012 version of the Puerto Rico Penal Code, the third definition of "intent" covered reckless conduct: "when the actor has foreseen or is conscious that there exists a high probability that his conduct

Rhode Island	"[T]he use of the word 'reckless' or 'recklessly' in penal statutes connotes something more than the negligence necessary to support a civil action for damages, and that the two words impart a disregard by the accused for the consequences of his act and an indifference to the safety of life and limb. . . . [T]he distinguishing factor, which properly classifies the operation of a motor vehicle as reckless, is that the evidence shows that a driver has embarked upon a course of conduct which demonstrates a heedless indifference to the consequences of his action." *State v. Lunt*, 106 R.I. 379, 260 A.2d 149, 151 (R.I. 1969).

The definitions of "recklessness" in the preceding chart demonstrate that the Maine definition is a perfectly ordinary, textbook definition of the term. There is nothing about the Maine statute that sets it

---

will produce the criminal act." P.R. Laws Ann. tit. 33, § 5035 (2012) (unofficial translation supplied).

In 2014, a new law was proposed, passed by both the Puerto Rico Senate and the House of Representatives, and sent to the Governor for his approval. *See* S.B. 1210 (P.R. 2014). That law was signed and approved on December 26, 2014, and it takes effect on March 26, 2015. *See* 2014 P.R. Laws No. 246. Article 12 of the new law eliminates the old culpable mental states (intent and negligence) and explicitly replaces them with the four mental states in the Model Penal Code: purposely, knowingly, recklessly, and negligently. *Compare id.* art. 12 (modifying art. 22 of Law No. 146-2012), *with* Model Penal Code § 2.02(2); *see also* P.R. House of Representatives, *P. del S. 1210 Informe Positivo* 9 (Nov. 13, 2014), http://www.tucamarapr.org/dnncamara/Documents/Measures /9fda6cce-8 8d9-4e39-a6ae-0dc163f421dc.pdf.

above and beyond the standard definitions provided in the Model Penal Code, *Black's Law Dictionary*, and the other jurisdictions in the First Circuit. Nor does it seem that the Model Penal Code and the First Circuit jurisdictions are unique in their definitions of recklessness. *See, e.g.*, Ariz. Rev. Stat. § 13-105 ("'Recklessly' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and *consciously disregards* a *substantial and unjustifiable risk* that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a *gross deviation* from the standard of conduct that a reasonable person would observe in the situation. . . .") (emphases added); N.Y. Penal Law § 15.05(3) ("A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and *consciously disregards* a *substantial and unjustifiable risk* that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a *gross deviation* from the standard of conduct that a reasonable person would observe in the situation.") (emphases added). Thus, the Maine definition of "recklessness" is far from extraordinary, but rather embraces the standard, generally accepted definition of the term.

Applying that definition, I disagree with the government's assertion that "[r]ecklessly is more akin to deliberately or knowingly" than negligently. The majority opinion echoes this claim, arguing that "Maine's definitions of knowingly as contrasted with recklessly differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur." *Ante*, at 19. The Supreme Court

has held that negligent conduct cannot constitute the "use" of force. *See Castleman*, 134 S. Ct. at 1414 n.8; *Leocal*, 543 U.S. at 9. On a volitional spectrum from "negligently" (clearly insufficient to constitute the "use" of force) to "intentionally" (clearly sufficient), the government and the majority seeks to place "recklessly" closer to the latter end. Yet the differences between the definitions of "recklessly" and "criminal negligence" are just as small as (if not smaller than) the differences between "knowingly" and "recklessly." *See Fernández-Ruiz*, 466 F.3d at 1130 ("To the extent recklessness differs from criminal negligence, '[t]he difference between them is that criminal negligence requires only a failure to perceive a risk, as compared to the recklessness requirement of an awareness and conscious disregard of the risk.'" (quoting *In re William G.*, 192 Ariz. 208, 963 P.2d 287, 292 n.1 (Ariz. Ct. App. 1997))); *see also* 1 Charles E. Torcia, Wharton's Criminal Law § 27 (15th ed. 1993). Indeed, just as Maine's definitions of *knowingly and recklessly* "differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur," *ante*, at 19 (emphasis added), so too do Maine's definitions of *recklessness and negligence* "differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur," *id.* *Compare* Me. Rev. Stat. tit. 17-A, § 35(3)(A) ("A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result."), *with id.* § 35(4)(A) ("A person acts with criminal negligence with respect to a result of the person's conduct when the person fails to be aware of a risk that the person's conduct will cause such a result."). Therefore, I find the attempt by the government and the majority to establish that

"reckless" conduct in Maine is akin to knowing, willful, or intentional conduct, or involves a "a substantial amount of deliberateness and intent," to be unavailing.

2. The Meaning of "Offensive Physical Contact"

In this context, the *actus reus* of "offensive physical contact" has two constituent elements: first, there must be "physical contact," and second, the physical contact must also be "offensive." Under Maine law, the physical contact required is "not limited to direct touchings, but also c[an] be effected by indirect touchings (*e.g.*, the touching of items intimately connected to the body, such as clothing or a cane, customarily regarded as part and parcel of an individual's 'person')." *Nason*, 269 F.3d at 19 (citing *State v. Rembert*, 658 A.2d 656, 658 (Me. 1995)).

Determining whether the physical contact is "offensive" is an objective test: courts ask whether a reasonable person would find the physical contact to be offensive, under the particular circumstances involved. *See United States v. Pettengill*, 682 F. Supp. 2d 49, 56 (D. Me. 2010) (stating that "'offensive physical contact' means 'physical contact which a reasonable person would find offensive under the circumstances'" (quoting Donald G. Alexander, Maine Jury Instruction Manual § 6–59 (4th ed. 2003)); *see also State v. Pozzuoli*, 693 A.2d 745, 747 (Me. 1997)) ("[T]he question is whether a reasonable person would find the contact to be offensive . . . ."); Restatement (Second) of Torts § 19 ("A bodily contact is offensive if it offends a reasonable sense of personal dignity."). Offensive physical contact, therefore, involves "'something less than bodily injury . . . but requires more than a mere touching of another.'" *Nason*, 269 F.3d at

19 (alteration in original) (quoting *Pozzuoli*, 693 A.2d at 747).

In examining the Maine assault statute, we have previously observed that "[t]wo factors distinguish mere touchings from offensive physical contacts: the *mens rea* requirement, and the application of a 'reasonable person' standard to determine whether a contact is offensive." *Nason*, 269 F.3d at 19 (citations omitted). Accordingly, to recklessly cause an offensive physical contact in Maine, a person must consciously disregard a risk that his or her conduct will cause physical contact—something more than a mere touching—that a reasonable person would find to be offensive under the circumstances. *See* Me. Rev. Stat. tit. 17-A, § 35(3)(A); *Nason*, 269 F.3d at 19; *Pettengill*, 682 F. Supp. 2d at 56; *Pozzuoli*, 693 A.2d at 747. Moreover, the disregard of that risk "when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." Me. Rev. Stat. tit. 17-A, § 35(3)(C).

B. The Meaning of "Use . . . Of Physical Force" Under Federal Law

1. The "Use" of "Force" and Common-Law Battery

The following discussion demonstrates that under the Lautenberg Amendment, the use-of-force requirement can be satisfied by an *actus reus* of an offensive touching, but such an offensive touch must be committed with a *mens rea* of intent rather than mere recklessness. In *Castleman*, the Supreme Court held that "force," for purposes of the Lautenberg Amendment, incorporates the common-law meaning of

"force." *Castleman*, 134 S. Ct. at 1410-11. The Court further stated that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *Id.* at 1411. On that basis, the Court held that "the requirement of 'physical force' is satisfied, for purposes of § 922(g)(9), by the degree of force that supports a common-law battery conviction"—including an offensive touching. *Id.* at 1413.

I agree with the government's contention that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence'" not only "the type of conduct that supports a common-law battery conviction," *id.* at 1411, but also the culpable mental states that support a battery conviction under the common law. *See, e.g., Freed*, 401 U.S. at 607-08 ("'(W)here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" (alteration in original) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))); *see also Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) ("It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" (quoting *Neder v. United States*, 527 U.S. 1, 23 (1999))). Thus, as urged by both parties here and as suggested by the Supreme Court in *Castleman*, I turn to examine the culpable mental states that attach to the common-law crime of battery. *See Castleman*, 134 S. Ct. at 1410-11.

In *Johnson*, the Supreme Court explained that "the common-law crime of battery . . . consisted of the *intentional* application of unlawful force against the person of another." *Johnson*, 559 U.S. at 139 (emphasis added). According to Supreme Court precedent, therefore, although the Lautenberg Amendment's "force" requirement can be satisfied by an *actus reus* of an offensive touching, such offensive contact must involve a *mens rea* of intent rather than mere recklessness. *See id.*; *see also Bailey v. United States*, 516 U.S. 137, 143 (1995) (defining the word "use" for purposes of the pre-1998 text of 18 U.S.C. § 924(c)—which had provided certain penalties if the defendant "uses or carries a firearm" during a crime of violence—and holding that such "use" required "active employment" and not "mere possession of a firearm"), *superseded by statute*, Bailey Fix Act, Pub. L. No. 105-386, 112 Stat. 3469 (1998), *as recognized in Abbott v. United States*, 562 U.S. 8 (2010); *Rembert*, 658 A.2d at 658 (stating that "[u]npermitted and intentional contacts . . . [are] actionable as an offensive contact"); *Lynch v. Commonwealth*, 131 Va. 762, 109 S.E. 427, 428 (Va. 1921) ("To constitute battery there must be some touching of the person of another, but not every such touching will amount to the offense. Whether it does or not will depend, not upon the amount of force applied, but upon the intent of the actor."); *id.* at 428 (reasoning that when a man placed his hand on a woman's shoulder after she already rejected his romantic advances, the evidence was sufficient to justify a verdict of guilt for battery due to the defendant's "*willful* violation of the sanctity of her person" (emphasis added)); *Black's Law Dictionary* 182 (10th ed. 2014) (defining tortious battery as a "nonconsensual, intentional, and offensive touching of another without lawful justification").

The sources cited by the government do not demonstrate otherwise. These sources suggest, at best, that a common-law battery by "bodily injury" or "infliction of harm" can be committed recklessly; they do not establish that a common-law battery by "offensive physical contact" can be committed recklessly. *See, e.g.*, Model Penal Code § 211.1(1)(a) ("A person is guilty of assault if he . . . attempts to cause or purposely, knowingly or recklessly causes bodily injury to another . . . ."); Wayne R. LaFave, 2 *Substantive Criminal Law* § 16.2(a) (2d ed.) ("The modern approach, as reflected in the Model Penal Code, is to limit battery to instances of physical injury and cover unwanted sexual advances by other statutes."); *id.* § 16.2(c)(2) n.32 ("[W]ith the tort of battery an intention to injure or touch offensively is needed"); *see also Commonwealth v. Hawkins*, 157 Mass. 551, 32 N.E. 862, 863 (1893) (stating that "the intent necessary to constitute" an offense of assault and battery is the "intentional doing of an action which, by reason of its wanton or grossly negligent character, exposes another to personal injury, and causes such an injury," without saying anything regarding whether such an offense could be committed by causing offensive physical contact).

The weakness of the government's argument is revealed by its selective citation and selective quoting. For example, the government quotes a criminal law treatise for the proposition that "a substantial majority of the battery-type statutes" in modern criminal codes "expressly state that the crime may be committed by recklessness," but conveniently omits the immediately following clause at the end of that sentence: "—that is, where there is subjective awareness of the high risk of *physical injury*." LaFave, *supra*, § 16.2(c)(2) (emphasis added). The unabridged

sentence says nothing about whether a battery by *offensive touching* can be committed by recklessness. Indeed, in the same section, the cited treatise states that the modern approach "limit[s] battery to instances of physical injury." *Id.* § 16.2(a). Furthermore, the treatise explains that the Model Penal Code's assault provision "covers only causing 'bodily injury,' on the ground that '*offensive touching* is not sufficiently serious to be made criminal, except in the case of sexual assaults as provided' elsewhere in the Code." *Id.* § 16.2(a) n.6 (quoting Model Penal Code § 211.1 cmt. at 185 (1980)). Given the foregoing, there is no justification for the majority's heavy reliance on the legislative history of the Lautenberg Amendment. *See, e.g., Rubin v. United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances.'" (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 n.33 (1978)) (internal quotation marks and citation omitted)).

Contrary to the government's arguments, our decision in *United States v. Bayes*, 210 F.3d 64 (1st Cir. 2000), supports the conclusion that battery by offensive touching requires intent and not mere recklessness with respect to the offensiveness of the contact. In *Bayes*, we evaluated the defendant's challenge to the sufficiency of the evidence to support his conviction for simple assault under 18 U.S.C. § 113(a)(5). *Bayes*, 210 F.3d at 65. The factual basis for the offense was that the defendant, Christopher Bayes, while on a Delta Airlines flight from Atlanta to England, "'put his hand on [a flight attendant's] buttocks and rubbed [her] buttocks and grabbed at the bottom of [her] buttocks,'" which a nearby passenger described as Bayes "'reaching behind the flight attendant and grabbing her in the rear end'" and

"'squeezing.'" *Id.* at 66 (second and third alterations in original) (quoting trial testimony). "Bayes persisted in being unruly despite periodic warnings from members of the crew." *Id.* "A scuffle ensued, ending only after the captain dumped thousands of gallons of fuel, diverted the aircraft in mid-flight, and made an unscheduled landing [in Maine] so that Bayes could be taken off the plane. . . ." *Id.*

Bayes argued that simple assault required "a specific kind of intent that the government failed to prove." *Id.* Namely, Bayes contended that "the government did not prove that he intended to injure [the flight attendant] or to threaten her with harm when he touched her on the buttocks." *Id.* at 67. Because the statute in question, § 113(a)(5), criminalized "[s]imple assault" but did "not define that term in any way," we "turn[ed] to the common law for additional guidance." *Id.* at 67-68. We stated that "the common law provided that an assault committed by way of a battery did not require an intent to cause or to threaten an injury as long as the defendant touched another in a *deliberately offensive* manner without a valid reason to do so." *Id.* at 69 (emphasis added). We reviewed prior opinions and determined that they "support the conclusion that, in a prosecution for simple assault under § 113(a)(5), it is sufficient to show that the defendant *deliberately touched another* in a *patently offensive manner* without justification or excuse." *Id.* (emphases added). Therefore, we held that the evidence supported Bayes's conviction because "the jury was entitled to conclude that Bayes had groped [the flight attendant] in a way that *could not have been accidental*, that *must have been deliberate*, and that was *patently offensive*." *Id.* (emphases added).

The preceding language from *Bayes* reveals that the *mens rea* required for a § 113(a)(5) battery-by-offensive-touching conviction is intent and not mere recklessness: the defendant must "deliberately" (and not accidentally) touch the victim in a "deliberately offensive" manner. *See id.* By contrast, under the Maine assault statutes, a defendant can commit the offense recklessly by merely disregarding (a) the risk that his conduct will cause physical contact (more than a mere touching) to occur, *and* (b) the risk that a reasonable person would find that physical contact to be offensive. *See* Me. Rev. Stat. tit. 17-A, § 35(3)(A). The "deliberate" intent that we required in *Bayes* is thus not necessary for a conviction for recklessly committed assault or domestic-violence assault in Maine.

Therefore, the following conclusion must be drawn: under the Lautenberg Amendment, the "force" requirement can be satisfied by an *actus reus* of an offensive touching, but such an offensive touch must involve a *mens rea* of intent rather than mere recklessness. That is, the defendant must *intend* to touch and *intend* that the touch be offensive, rather than merely disregard the risk that a touch will occur and be considered offensive. By contrast, the Maine statutes at issue permit conviction when the defendant merely disregards a risk that his or her conduct will cause physical contact that a reasonable person would find to be offensive. Accordingly, applying a categorical approach and the Supreme Court's statements in *Castleman* and *Johnson*, a conviction under either of the Maine assault statutes encompasses conduct beyond the common-law definition of battery, and thus does not necessarily establish a misdemeanor crime of domestic violence under the Lautenberg Amendment. This conclusion mandates

reversal here and is further supported by Footnote Eight of *Castleman* and the circuit court cases cited therein, as explained below.

2. *Castleman's* Footnote Eight

In *Castleman*, the Supreme Court opined that the "merely reckless causation of bodily injury under the [Tennessee assault statute] may not be a 'use' of force." *Castleman*, 134 S. Ct. at 1414. The Court explained this statement in Footnote Eight, noting that Leocal held that "'"use" requires active employment.'" *Id.* at 1414 n.8 (quoting *Leocal*, 543 U.S. at 9). The Court then stated that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," contrasting decisions from ten other circuit courts of appeals against our opinion in *Booker*, which the Supreme Court listed as the only outlier.[14] Together, as explained in more detail below, these cases establish that a predicate "crime of violence" under 18 U.S.C. § 16 and analogous provisions must be committed with a degree of intentionality greater than recklessness. Although § 16 is a different federal statute, its language is substantially similar to the

---

[14] *Id.* To illustrate contrast with our holding in *United States v. Booker*, 644 F.3d 12, 19–20 (1st Cir. 2011), the Supreme Court cited the following circuit court decisions in *Castleman's* Footnote Eight: *United States v. Palomino García*, 606 F.3d 1317, 1335–36 (11th Cir. 2010); *Jiménez-González v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *United States v. Zúñiga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Torres-Villalobos*, 487 F.3d 607, 615–16 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernández-Ruiz v. Gonzales*, 466 F.3d 1121, 1127–32 (9th Cir. 2006) (en banc); *García v. Gonzales*, 455 F.3d 465, 468–69 (4th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260, 263–65 (3d Cir. 2005); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003); *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001).

definition of a misdemeanor crime of domestic violence for purposes of the Lautenberg Amendment. In particular, the definition in § 16(a) is nearly identical to the equivalent definition for § 922(g)(9). *Compare* 18 U.S.C. § 16(a) (defining the term "crime of violence" to mean "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"), *with* 18 U.S.C. § 921(a)(33)(A) (defining a "misdemeanor crime of domestic violence" as an misdemeanor offense that "has, as an element, the use or attempted use of physical force"). Keeping the similarity of the analogous statutes in mind, I review below each case cited by the Supreme Court in *Castleman's* Footnote Eight.

a. Second Circuit

The Second Circuit considered the issue in *Jobson v. Ashcroft*, 326 F.3d 367, 369 (2d Cir. 2003), which examined whether second-degree manslaughter in New York constituted a crime of violence under 18 U.S.C. § 16(b). A "crime of violence" is defined in § 16(b) as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).[15] The Second Circuit reiterated its

---

[15] Given that § 16(b)'s definition includes offenses that merely "involve[] a *substantial risk* that physical force . . may be used," *id.* (emphasis added), its language is far more susceptible to a reading that it encompasses reckless conduct than is the equivalent language for § 16(a) and § 922(g)(9), which both require the "use" or "attempted use" of "physical force." *See supra* n.2; *see also* 18 U.S.C. § 16(a); *id.* § 922(g)(9); *id.* § 921(a)(33)(A); Me. Rev. Stat. tit. 17-A, § 35(3) ("A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause

previous holding that "the verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) 'contemplates only *intentional* conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will *intentionally* employ physical force.'" *Jobson*, 326 F.3d at 373 (internal quotation marks omitted) (quoting *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001)).

To satisfy § 16(b)'s definition of "crime of violence," therefore, a defendant must have risked having to *intentionally* use force to commit the offense. *Id.* at 374; *see also id.* at 373 ("[T]he risk in section 16(b) concerns the defendant's likely use of violent force as a means to an end."). "By contrast, a defendant who is convicted of second-degree manslaughter, like other offenses of *pure* recklessness, may lack any 'intent, desire or willingness to use force or cause harm at all.'" *Id.* at 374 (quoting *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992), *abrogated on other grounds by Begay v. United States*, 553 U.S. 137 (2008)). Accordingly, the Second Circuit concluded that second-degree manslaughter in New York is not a

---

such a result. . . ."); Model Penal Code § 2.02(2)(c) ("A person acts recklessly . when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."). Therefore, the cases holding that reckless conduct is insufficient to support a subsequent § 16(b) conviction provide even stronger support for the defendants' position than do the cases involving § 16(a). *Cf. Garcia*, 455 F.3d at 468 (reasoning that the "use" of "physical force" requires the *intentional* employment of physical force, and therefore holding that a New York second-degree reckless assault conviction "does not contain an element that there be the *intentional* employment of physical force against a person or thing, and thus is beyond the scope of 18 U.S.C. § 16(a)").

crime a violence under § 16(b) and thus is not an aggravated felony justifying removal under the immigration laws. *Id.* at 376.

b. Third Circuit

The Third Circuit reached a similar result in *Oyebanji v. Gonzales*, 418 F.3d 260, 263 (3d Cir. 2005), which also involved immigration removal proceedings premised upon the definition of "crime of violence" under § 16(b). The petitioner's underlying conviction was for vehicular homicide under New Jersey law, which requires proof of recklessness. *Id.* The Third Circuit thus stated that it was "required to decide the very question that the *Leocal* Court did not reach"—"'whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16.'" *Id.* (quoting *Leocal*, 543 U.S. at 13).

Citing the *Leocal* Court's distinction between "violent" crime and merely "accidental" conduct, the Third Circuit explained that "[t]he quintessential violent crimes—murder, assault, battery, rape, etc.—involve the intentional use of actual or threatened force against another's person, and the term 'accidental' is most often used to describe events that did not 'occur [ ] as a result of anyone's purposeful act.'" *Id.* at 264 (second alteration in original) (citing *Black's Law Dictionary* 16 (8th ed. 1999)). The Third Circuit reasoned that "accidental" conduct "is not enough to qualify as a crime of violence" under *Leocal*, and it decided that such "accidental" conduct "would seem to include reckless conduct." *Id.* The panel further stated that the Third Circuit ought to follow the Supreme Court's "'considered dicta'" in *Leocal*, *id.* at 265 (quoting *McCoy*, 950 F.2d at 19), and that while the panel "appreciate[d]" the government's arguments, it

"believe[d] that those arguments must be directed to the Supreme Court or Congress." *Id.*

c. Fourth Circuit

The Fourth Circuit considered these issues in *García v. Gonzales*, 455 F.3d 465 (4th Cir. 2006). *García* also involved removal proceedings and whether a certain predicate offense qualified as an aggravated felony by virtue of being "a crime of violence" under 18 U.S.C. § 16. *Id.* at 468. The predicate offense considered in *García* was reckless assault in the second degree under New York law, which provides that "'[a] person is guilty of assault in the second degree when . . . (4) He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.'" *Id.* (alterations in original) (quoting N.Y. Penal Law § 120.05). The Fourth Circuit summarily determined that the first definition of "a crime of violence" under § 16(a)—"an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"—did not apply to the New York second-degree reckless assault conviction. *Id.* at 468 (quoting 18 U.S.C. § 16(a)). The court reasoned that the definition of the New York offense "does not contain an element that there be the *intentional* employment of physical force against a person or thing, and thus is beyond the scope of 18 U.S.C. § 16(a)." *Id.* (emphasis added). Therefore, according to the Fourth Circuit, "the use . . . of physical force" requires the intentional employment of physical force. *See id.*

Turning to the definition in § 16(b), the Fourth Circuit held that "recklessness, like negligence, is not enough to support a determination that a crime is a 'crime of violence.'" *Id.* at 469. In making this

determination, the Fourth Circuit held that in order to satisfy § 16(b)'s requirement that the predicate offense "involve a substantial risk that physical force against the person or property of another may be used," the force must "be applied as a means to an end." *Id.* (quoting *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 447 (4th Cir. 2005)) (internal quotation marks omitted); *see also id.* ("[W]e are of opinion that 18 U.S.C. § 16(b) requires that the substantial risk involved be a substantial risk that force will be employed as a means to an end in the commission of the crime, not merely that reckless conduct could result in injury.").

d. Fifth Circuit

The Fifth Circuit considered the definition of "crime of violence" under 18 U.S.C. § 16(b) in *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001). In that case, the Fifth Circuit reasoned that § 16(b) requires that "the offender *intentionally* use the force against the person or property of another." *Id.* at 927. Because "*[i]ntentional* force against another's person or property is virtually never employed to commit" the offense of felony driving while intoxicated ("DWI") in Texas, the court held that "felony DWI is not a crime of violence as defined by 18 U.S.C. § 16(b)." *Id.*

e. Sixth Circuit

In *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006), the Sixth Circuit followed the "'considered dicta'" of *Leocal* and the reasoning of the Third and Fourth Circuits to hold that "a crime requiring only recklessness does not qualify as a 'crime of violence' under 18 U.S.C. § 16," nor, because it "uses identical language," under *U.S. Sentencing Guidelines Manual* (U.S.S.G.) § 2L1.2(b)(1).

f. Seventh Circuit

Similarly, the Seventh Circuit followed its sister circuits in holding that "reckless crimes are not crimes of violence under Section 16(b)." *Jiménez-González v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008). The Seventh Circuit found persuasive the Third Circuit's reasoning in *Oyebanji* that the use of physical force requires active employment and not merely negligent or accidental conduct. *Id.* (citing *Oyebanji*, 418 F.3d at 263). The Seventh Circuit further reasoned that "accidental and reckless crimes are not the type of 'violent' crimes Congress intended to distinguish as worthy of removal." *Id.* To support its holding, the Seventh Circuit emphasized the "primary distinction" that crimes of violence involve *intentional* conduct whereas most crimes of recklessness involve non-purposeful conduct. *See id.* at 561-62.

g. Eighth Circuit

Likewise, the Eighth Circuit stated that the *Leocal* "Court's reasoning suggests that crimes requiring only reckless disregard for the risk of physical injury to another are not crimes of violence under § 16." *United States v. Torres-Villalobos*, 487 F.3d 607, 615 (8th Cir. 2007). Examining Minnesota law, the Eighth Circuit determined that "a person can commit second-degree manslaughter without using force or risking the intentional use of force," because the crime can be committed recklessly. *Id.* at 616. Giving examples, the court explained that:

> A person can commit this crime by recklessly leaving a child alone with lit candles that later start a fire, by allowing a child to die of dehydration while in the person's care, by leaving explosives and blasting caps stored in an automobile

> where they are later ignited by the use of jumper cables, and, indeed, by driving drunk with 'culpable negligence' in a manner that causes the death of a passenger.

Id. (internal citations omitted). Therefore, the court held, "the 'use of force,' as *Leocal* interpreted that phrase, is not an element of a second-degree manslaughter conviction," meaning that the Minnesota second-degree manslaughter offense is not a crime of violence under § 16(a). *Id.* Turning to § 16(b), the court also held that second-degree manslaughter under Minnesota law does not "involve a risk that the perpetrator will intentionally use physical force in the course of committing the offense." *Id.* at 616-17. Because Minnesota second-degree manslaughter can be committed recklessly without the intentional use of force or risking the intentional use of force, the Eighth Circuit held that it is not a crime of violence under § 16. *Id.* at 617.

h. Ninth Circuit

In *Fernández-Ruiz v. Gonzales*, 466 F.3d 1121, 1123 (9th Cir. 2006) (en banc), the Ninth Circuit held that a prior Arizona assault conviction did not constitute a crime of violence under § 16(a) because that federal statute "covers only those crimes involving intentional conduct," and thus the merely reckless use of force (as covered by the Arizona statute) was insufficient to establish a violation. *See also id.* ("Because the relevant Arizona statute permits conviction when a defendant recklessly but unintentionally causes physical injury to another, and because the petitioner's documents of conviction do not prove he intentionally used force against another, we conclude the federal statute does not apply."). In so holding, the court "agree[d] with [its] sister circuits that the reasoning of

Leocal—which merely holds that using force negligently or less is not a crime of violence—extends to crimes involving the reckless use of force." *Id.* at 1129. The Ninth Circuit reasoned that *Leocal* emphasized that crimes of violence cannot be "'accidental.'" *Id.* (quoting *Leocal*, 543 U.S. at 9). The court defined "accidental" as "'[n]ot having occurred as a result of anyone's purposeful act,'" and it defined "purposeful" as "'[d]one with a specific purpose in mind.'" *Id.* at 1129-30 (alterations in original) (citing *Black's Law Dictionary* 16, 1298 (8th ed. 2004)). The Ninth Circuit further concluded that "[r]eckless conduct, as generally defined, is not purposeful." *Id.* at 1130.

"Even more clearly, reckless conduct as defined by Arizona law is not purposeful." *Id.* As support for this statement, the Ninth Circuit cited the Arizona criminal statute defining recklessness. *Id.* Under that statute, "'[r]ecklessly' means . . . that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." Ariz. Rev. Stat. Ann. § 13-105 (10)(c). That "risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." *Id.* This definition of recklessness is substantially similar to the equivalent Maine definition, as well as the other definitions outlined in the chart in Part II(A)(1), *supra*. For purposes of § 16, the Ninth Circuit saw no important differences between negligence and recklessness, considering each *mens rea* to constitute the type of non-purposeful conduct that *Leocal* held was insufficient to establish a crime of violence involving the "use" of force. *Fernández-Ruiz*, 466 F.3d at 1129-30. The court reasoned that the "plain meaning" of the

word "use" denotes that "physical force is instrumental to carrying out the crime." *Id.* By contrast, the "subjective awareness" of risk that characterizes a reckless act "is not the same as the *intentional* use of physical force against the person of another." *Id.* The court further explained that "[t]he bedrock principle of *Leocal* is that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another." *Id.* at 1132. Therefore, the Ninth Circuit concluded that recklessness is not "a sufficient mens rea to establish that a conviction is for a crime of violence under § 16." *Id.* at 1130.

i. Tenth Circuit

In *United States v. Zúñiga–Soto*, 527 F.3d 1110, 1113 (10th Cir. 2008), the Tenth Circuit considered whether the "crime of violence" enhancement provision under U.S.S.G. § 2L1.2 applied to the appellant's prior Texas state conviction for assaulting a public servant. Applying the commentary to this U.S.S.G. provision, the Tenth Circuit's "sole task" was to whether the appellant's "prior felony conviction qualifies as a crime of violence because the offense had as an element the *use* of physical force." *Id.* at 1115. Under the appellant's offense of conviction, a person commits an assault if he or she "intentionally, knowingly, or recklessly causes bodily injury to another." Tex. Penal Code Ann. § 22.01(a)(1). On appeal to the Tenth Circuit, the appellant argued that "his prior conviction did not have as an element the use of physical force because the Texas assault statute's *mens rea* component could be satisfied by recklessness." *Zúñiga-Soto*, 527 F.3d at 1115. The Tenth Circuit agreed, citing *Leocal*, its own precedent,

and "the persuasive reasoning of [its] sister circuits." *Id.* at 1113, 1123.

j. Eleventh Circuit

Finally, applying similar reasoning, the Eleventh Circuit also relied on *Leocal* and the decisions of the other circuit courts to hold that "a conviction predicated on a *mens rea* of recklessness does not satisfy the 'use of physical force' requirement under [U.S.S.G.] § 2L1.2's definition of 'crime of violence.'" *United States v. Palomino García*, 606 F.3d 1317, 1336 (11th Cir. 2010). Citing "the near unanimity of the circuit courts on this issue," the Eleventh Circuit concluded that *Leocal* "plainly suggests that crimes requiring only a reckless[] disregard for the risk of physical injury to others are not crimes of violence." *Id.* at 1336 n.16. The Eleventh Circuit further explained that "[b]ecause Arizona law defines recklessness as nothing more than the conscious disregard of a substantial and unjustifiable risk, this is more akin to negligence and cannot be said to require the *intentional* use of force." *Id.* at 1336 (internal citation omitted). Therefore, the court held that an Arizona conviction "predicated on the reckless causation of physical injury does not qualify as a crime of violence under [U.S.S.G.] § 2L1.2." *Id.*

C. Comparison of Analogous Statutory Language

As is evident from the discussion above, most of our sister circuits have held that the "use . . . of physical force" requires the type of intentional conduct for which mere recklessness cannot suffice. Although these cases involved different provisions than the Lautenberg Amendment, the statutory texts involved are not materially different, and in many cases, are virtually identical. As referenced herein, analogous

provisions to the definition of "misdemeanor crime of domestic violence" for purposes of the Lautenberg Amendment are compared in the following chart:

Statute	Relevant Language
"misdemeanor crime of domestic violence," Lautenberg Amendment, 18 U.S.C. § 922(g)(9)	"has, as an element, the use or attempted use of physical force" 18 U.S.C. § 921(a)(33)(A)
"crime of violence," 18 U.S.C. § 16(a)	"has as an element the use, attempted use, or threatened use of physical force against the person or property of another" 18 U.S.C. § 16(a)
"crime of violence," 18 U.S.C. § 16(b)	"any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" 18 U.S.C. § 16(b)
"[c]rime of violence," U.S.S.G. § 2L1.2	"[an] offense . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another" U.S.S.G. § 2L1.2, cmt. 1(B)(iii).
"violent felony" under the ACCA, 18 U.S.C. § 924(e)(1)	"has as an element the use, attempted use, or threatened use of physical force against the person of another" 18 U.S.C. § 924(e)(2)(B)(I)

It is readily apparent that the language involved in most of the preceding provisions is nearly identical, and for present purposes is materially indistinguishable.[16] Moreover, I do not doubt that the Supreme Court was well aware that the cases it cited in *Castleman's* Footnote Eight involved different provisions, yet the Court nonetheless contrasted the holdings of our sister circuits in those cases with our holding in *Booker* before remanding the instant cases to us for reconsideration in light of *Castleman*. *See Castleman*, 134 S. Ct. at 1414 n.8. Thus, to the Supreme Court, these cases and provisions were sufficiently analogous to justify the instant remand. *Cf. Smith*, 544 U.S. at 233 ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning

---

[16] The majority claims that § 16(a) is "not analogous" to § 922(g)(9). *Ante*, at 12. I disagree, given that these two provisions contain nearly identical language. Section 16(a) defines a "crime of violence," whereas § 922(g)(9) involves a "misdemeanor crime of domestic violence." The relevant definition for § 922(g)(9) is an offense that "has, as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A). The definition under § 16(a) is materially indistinguishable: an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* § 16(a). This definition differs only in the addition of the "threatened use" of physical force as an alternative, and the explanation that the force be used "against the person or property of another." The former difference (the inclusion of "threatened use") is neither implicated in the current case nor in any of the analogous precedents referenced herein. The latter change appears to be largely a distinction without a difference, as it is difficult to contemplate how or why the "use of physical force" for purposes of § 922(g)(9) would mean force used in any way other than "against the person or property of another."

in both statutes."); *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) (stating that "[t]he similarity of language" in two statutory provisions sharing "a common raison d'etre" constitutes "a strong indication that the two statutes should be interpreted pari passu"). The government and the majority fail to persuasively establish that the meaning of "the use . . . of physical force" in these various federal definitions of a "crime of violence" should be so similar in every other context, yet so different as to be outcome-determinative in the instant context. For those reasons, I find the foregoing precedent more persuasive than the majority opinion here. I thus agree with our sister circuits that the "use . . . of physical force" for a "crime of violence" requires the intentional, and not merely reckless, employment of physical force. I find this conclusion to be particularly true for the subsumed offense at issue in the instant case: the combination of a *mens rea* of "recklessness" with an *actus reus* of "offensive physical contact." *Cf. Nason*, 269 F.3d at 19 (stating that the *mens rea* requirement is one of two factors that "distinguish mere touchings from offensive physical contacts").

III. CONCLUSION

Despite the foregoing precedent from the Supreme Court and our sister circuits, the majority opinion nonetheless seeks to hew to our prior decision in *Booker* and to resolve these cases, yet again, exactly as we did in *Armstrong I* and *Voisine I*. With due respect, for the reasons explained above, I believe that the majority is wrong.

The Lautenberg Amendment is premised upon grave concerns and laudable purposes, as articulated both by the Supreme Court in *Castleman* and by the

majority in this case. I share those concerns and strongly agree with those purposes. However, a general agreement with those goals need not dictate the result here. This case does not present a litmus test for judges, asking whether we oppose domestic violence and gun violence. Were our job so simple, it would be an easy matter to decide in favor of the government. But that is not our role. Our judicial obligations preclude us from such results-oriented decision making.

Rather than deciding on the basis of personal beliefs and policy preferences, or seeking to ensure that the Lautenberg Amendment encompass the broadest possible swath of conduct within its ambit, this case requires us to engage in statutory interpretation. This legal task implicates the difference between Congress's broad policy goals versus the precise statutory language employed to achieve those ends. That is, does the language chosen by Congress—the "use or attempted use of physical force"—necessarily apply to all Maine misdemeanor assault convictions for recklessly causing offensive physical contact? Applying the relevant precedent to this question of statutory interpretation counsels that we answer this inquiry in the negative and resolve this appeal in favor of the defendants. I conclude that the particular subsumed Maine offense at issue here, the reckless causation of offensive physical contact, does not necessarily require the "use . . . of physical force" and thus does not categorically constitute a misdemeanor crime of domestic violence under the Lautenberg Amendment.

For the reasons stated herein, I would reverse the defendants' convictions. Indeed, I believe that the Supreme Court has obligated us to do so. Therefore, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 12-1213
12-1216

UNITED STATES OF AMERICA,
Appellee,

v.

STEPHEN L. VOISINE; WILLIAM E. ARMSTRONG III,
Defendants, Appellants.

Before

Lynch, *Chief Judge*,
Torruella, Stahl, Howard, Thompson, Kayatta
and Barron, *Circuit Judges*.

ORDER OF COURT
Entered: March 31, 2015

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

TORRUELLA, *Circuit Judge*, Dissenting. I dissent from the denial of en banc hearing, as I believe that this case meets our standards for rehearing for a conflict of law, and for the reasons explained in my dissent to the panel opinion.

By the Court:

/s/ Margaret Carter, Clerk

cc: Ms. Bunker, Ms. Malone, Mr. Lowell, Ms. McGaughey & Ms. Villa

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

[Filed March 11, 2011]

Criminal No. 1:11-cr-17-JAW
(18 U.S.C. § 922(g)(9) & 16 U.S.C. § 668)

UNITED STATES OF AMERICA

v.

STEPHEN L. VOISINE

INFORMATION

The United States Attorney charges:

COUNT ONE

On about October 18, 2009, in the District of Maine, the defendant,

STEPHEN L. VOISINE

having been convicted of a misdemeanor crime of domestic violence, specifically, the crime of assault in violation of Section 207 of Title 17-A of the Maine Revised Statutes Annotated in *State of Maine v. Stephen L. Voisine*, Docket Number 2003-210 (Maine District Court, Houlton), knowingly possessed in or affecting commerce a Remington, Model 7400, .30-06 caliber rifle bearing serial number B8150483, in violation of Title 18, United States Code, Section 922(g)(9).

COUNT TWO

On about October 18, 2009, in the District of Maine, the defendant,

STEPHEN L. VOISINE

within the United States and without being permitted to do so as required by law, did knowingly and with wanton disregard for the consequences of his act, shoot at and kill a bald eagle, commonly known as the American eagle (*Haliaeetus leucocphalus*), in violation of Title 16, United States Code, Section 668(a).

Dated: 2/10/11

/s/ F. Todd Lowell
F. Todd Lowell
Supervisory Assistant United States Attorney

State Of Maine — District Court
Aroostook, SS. — District I
Criminal Action — Division Of Southern Aroostook
Docket No. HOUDC—CR—2003—210

STATE OF MAINE

v.

STEPHEN L. VOISINE

BEFORE:

The Honorable Bernard O'Mara, Judge of the District Court, in Houlton, Maine, on February 2, 2004.

APPEARANCES:

Suzanne Lilley,
Esq. For the State

Jeffrey Pickering,
Esq. For the Defendant

---

[2] (This matter came for hearing before the Honorable Bernard O'Mara, Judge of the District Court, in Houlton, Maine, on February 2, 2004.)

COURT: Stephen Voisine.

JEFFREY PICKERING, ESQ.: It's for plea, Your Honor. We have a negotiated disposition on that, as well.

COURT: Oh, this matter was returned to the docket.

(Attorneys conferring)

COURT: And the plea today?

* * *

MR. PICKERING: A plea of guilty, Your Honor.

COURT: And the agreed disposition?

SUZANNE LILLEY, ESQ.: Two-hundred-dollar fine, Your Honor.

COURT: Is that your understanding, sir?

STEPHEN VOISINE, THE DEFENDANT HEREIN: Yes.

COURT: Are you prepared to take care of that today?

MR. PICKERING: Your Honor, he-he's-he will be unable to today. He's unemployed and there's a pending disability application. He needs sixty days. He could possibly have it before that, but sixty days to be sure.

COURT: So, if I gave him to April 12th?

(Attorney—client confer)

MR. PICKERING: Yeah, that would be fine.

COURT: 9:30 in the morning, sir. At 9:30 on April 12th, you're to have it paid by then or be here.

[3] MR. VOISTNE: Mm—hmm.

(Attorney—client confer)

END OF HEARING

CERTIFICATION

I HEREBY CERTIFY that the foregoing, pages 2 through 3, is a true transcript of Tape Number 1663, Index Numbers 5897 through 5976, recorded on February 2, 2004, at the Maine District Court located at Houlton, Maine, of the case entitled *STATE OF MAINE v. STEPHEN L. VOISINE*.

Dated: September 24, 2010

/s/ Brenda J. Cheney
Brenda J. Cheney
TRANSCRIBER

A TRUE COPY, dated at Bangor, Maine, this 24th day of September, A.D., 2010.

/s/ Brenda J. Cheney
Notary
Maine District Court

State Of Maine
Aroostook, Ss.

District Court
Location: Houlton
Docket No. CR—2003—210

STATE OF MAINE

v.

STEPHEN L. VOISINE
DOB: [redacted]60
SIN:
[redacted]
Wytopitlock, ME 04497
G: Male Ht: 5' 10" Wt: 210 H: Brown
E: Blue R:White

COMPLAINT
(ATN: 069903 A)

COUNT 1: ASSAULT

The undersigned officer, being duly sworn, states upon information and belief that:

COUNT 1: 17—A M.R.S.A. §207 (1)(A)
ASSAULT
CLASS D

On or about April 12, 2003, in Wytopitlock, Aroostook County, Maine, STEPHEN L VOISINE, did intentionally knowingly or recklessly cause bodily injury or offensive physical contact to Tina M. Farwell. The crime involved domestic violence.

/s/ Illegible
COMPLAINANT

Sworn to before me, 6/2, 2003

/s/ Illegible
Clerk/Complaint ~~Justice/Judge~~

OFFICER: Daniel Deschaine
DEPT: Maine State Police
ARRAIGNMENT: June 16, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

1:11-cr-00017-JAW

UNITED STATES OF AMERICA

v.

STEPHEN L. VOISINE

ORDER ON MOTION TO DISMISS

On March 11, 2011, Stephen L. Voisine pleaded guilty to both counts of a two count information. Count I charged him with possession of a firearm after having been convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9) and Count II charged him with shooting and killing a bald eagle in violation of 16 U.S.C. § 668(a). *Information* (Docket # 2). On March 15, 2011, Mr. Voisine moved to dismiss Count I of the information. *Mot. to Dismiss Count I of the Information* (Docket # 10). The Government responded on April 5, 2011, and Mr. Voisine replied to the response on April 11, 2011. *Gov't's Resp. to Def.'s Mot. to Dismiss* (Docket # 12); *Def.'s Reply to Gov't's Resp. to Mot. to Dismiss* (Docket # 13).

Mr Voisine first claims that the charge infringes his Second Amendment right to bear arms. He next contends that the information fails to state a federal offense because the First Circuit's decision in *United States v. Nason*,[1] which concluded that a conviction

[1] 269 F.3d 10 (2001).

under Maine's assault statute constitutes a "misdemeanor crime of domestic violence" under federal law, is no longer binding on this Court. Instead, he asserts that in interpreting the term, "physical force," as it appears in the firearms possession statute, the Court must apply the construction the United States Supreme Court in *Johnson v. United States*[2] and the First Circuit in *United States v. Holloway*[3] gave the same term for purposes of the Armed Career Criminal Act (ACCA), and if it does so, Count I must be dismissed because the Defendant has not committed a predicate crime.

The Court considered these exact issues in denying a motion to dismiss the indictment in *United States v. Bryant*, 1:11-cr-00021-JAW. In fact, the legal arguments presented by both Mr. Voisine and the Government in this motion are precisely the same as those presented in *Bryant*. Moreover, there are no factual differences distinguishing this case from *Bryant*. Accordingly, the Court incorporates its reasoning in *Bryant* and DENIES Mr. Voisine's Motion to Dismiss Count I of the Information (Docket # 10).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 14th day of April, 2011

---

[2] 130 S. Ct. 1265 (2010).

[3] 630 F.3d 252 (1st Cir. 2011).

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

1:11-cr-00021-JAW

UNITED STATES OF AMERICA

v.

TROY BRYANT

ORDER ON MOTION TO DISMISS

Troy Bryant moves to dismiss the indictment charging him with possession of ammunition after having been convicted of a misdemeanor crime of domestic violence. He first claims that the charge infringes his Second Amendment right to bear arms. He next contends that the indictment fails to state a federal offense because the First Circuit's decision in *United States v. Nason*,[4] which concluded that a conviction under Maine's assault statute constitutes a "misdemeanor crime of domestic violence" under federal law, is no longer binding on this Court. Instead, he asserts that in interpreting the term, "physical force," as it appears in the firearms possession statute, the Court must apply the construction the United States Supreme Court in *Johnson v. United States*[5] and the First Circuit in *United States v. Holloway*[6] gave the same term for purposes of the Armed Career Criminal Act (ACCA), and if it does so, the indictment

---

[4] 269 F.3d 10 (2001).

[5] 130 S. Ct. 1265 (2010).

[6] 630 F.3d 252 (1st Cir. 2011).

must be dismissed because the Defendant nas not committed a predicate crime. The Court has previously considered and rejected most of these arguments and does so again. As regards *Johnson* and *Holloway*, the Court does not consider judicial interpretations of the ACCA to be sufficiently persuasive to disturb the binding power of First Circuit precedent on the question of the definition of "physical force" for purposes of federal firearms possession prohibitions. The Court denies the Defendant's motion.

I. BACKGROUND

A. Procedural Background

On February 24, 2011, a federal grand jury indicted Troy Bryant for possessing ammunition after having been convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9).[7] *Indictment* (Docket # 13). On March 11, 2011, Mr. Bryant moved to dismiss the indictment. *Mot. to Dismiss Indictment* (Docket # 20) (*Def.'s Mot.*). On April 1, 2011, the Government responded, and on April 4, 2011, Mr. Bryant replied. *Gov't's Resp. to Def.'s Mot. to Dismiss* (Docket # 24) (*Gov't's Resp.*); *Def.'s Reply to Gov't's Resp. to Mot. to Dismiss* (Docket # 25) (*Def.'s Reply*).

---

[7] 18 U.S.C. § 922(g)(9) makes it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess . . . any . . ammunition." According to the indictment, Mr. Bryant was convicted in 2005 of a misdemeanor crime of domestic violence in violation of 17-A M.R.S. § 207. *Indictment* at 1.

II. DISCUSSION

A. Motion to Dismiss Indictment

A Court should exercise its authority to dismiss cautiously since to dismiss an indictment 'directly encroaches upon the fundamental role of the grand jury.'" *United States v. Pettengill*, 682 F. Supp. 2d 49, 51 (D. Me. 2010) (quoting *United States v. Thomas*, 519 F. Supp. 2d 141, 143-44 (D. Me. 2007)). The power is "appropriately reserved, . . . for extremely limited circumstances. *Whitehouse v. United States Dist. Court*, 53 F.3d 1349, 1360 (1st Cir. 1995). "Unless the Government has made what can fairly be described as a full proffer of the evidence it intends to present at trial to satisfy the jurisdictional element of the offense, the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment." *Pettengill*, 682 F. Supp. 2d at 51 (quoting *United States v. Alfonso*, 143 F.3d 772, 776-77 (2nd Cir. 1998)).

B. The Second Amendment

Mr. Bryant first argues that 18 U.S.C. § 922(g)(9) violates the Second Amendment. *Def.'s Mot.* at 2-8. He acknowledges that the Court "previously considered, and rejected, this basis to dismiss an Indictment charged pursuant to . . . §922(g)(9) by way of the order entered in *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008); *United States v. Wyman*, 667 F. Supp. 2d 151 (D. Me. 2009); and *United States v. Pettengill*, 682 F. Supp. 2d 49 (D. Me. 2010)." *Def.'s Mot.* at 5. He nevertheless challenges those rulings on two grounds: (1) the rulings employed improper levels of scrutiny; and (2) they were based on a flawed construction of § 922(g)(9). The Court stands by its constitutional analyses in those cases. As to the latter challenge,

until the First Circuit directs otherwise, the Court concludes that its construction of § 922(g)(9) in *Booker*, *Wyman*, and *Pettengill* remains good law in this District.

C. Failure to State a Federal Offense

Mr. Bryant argues that the indictment fails to state a federal offense by failing to allege a predicate crime under § 922(g)(9). To be convicted of violating § 922(g)(9), the defendant must have been previously convicted of a misdemeanor crime of domestic violence. The indictment alleges that Mr. Bryant had been previously convicted of such a crime, specifically a violation of Maine's assault statute, 17-A M.R.S. § 207. However, Mr. Bryant argues that a conviction under Maine's assault statute, without more, does not necessarily meet the federal definition of a misdemeanor crime of domestic violence because it does not require the same *mens rea* or level of physical force.[8]

---

[8] Mr. Bryant argues that consistent with *Taylor v. United States*, 495 U.S. 575, 595 (1990) and *Shepard v. United States*, 544 U.S. 12, 26 (2005), the Court must employ the First Circuit's two-tiered categorical approach in determining whether his prior conviction meets the definition of "use or attempted use of physical force." *Def.'s Mot.* at 8-9. The two-tiered approach turns first to the statutory language to determine whether the statute "sweeps more broadly" than the qualifying definition, and if so, turns next to whether the record of conviction establishes the factual basis for the conviction. *United States v. Miller*, 478 F.3d 48, 50 (1st Cir. 2007). In *Booker*, this Court agreed that the *Taylor/Shepard* approach, as refined by the First Circuit, would apply "with equal force to determine if a person has been convicted of a misdemeanor crime of domestic violence within the meaning of 18 U.S.C. § 921(a)(33)." *Booker*, 555 F. Supp. 2d at 223. Here, the Government attached to its response the court documents for Mr. Bryant's assault conviction. *Gov't's Resp.* Attach. 1-3. But they are unrevealing. The Government also

Section 921(a)(33)(A) defines "misdemeanor crime of domestic violence" for purposes of §922(g)(9) as:

> . . . an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

17-A M.R.S. § 207 states in part:

> 1. A person is guilty of assault if:
>
> A. The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person.

---

attached a copy of the police report, which is revealing but may not be considered under *Shepard*. 544 U.S. at 26; *United States v. Cadieux*, 500 F.3d 37, 43 (1st Cir. 2007) ("The Court, however, rejected the use of a police report as a basis for judicial fact-finding because permitting a sentencing judge considering an [Armed Career Criminal Act] enhancement to make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea raises Sixth and Fourteenth Amendment concerns") (internal punctuation omitted). In this case, therefore, the Court agrees with Mr. Bryant that the court-sanctioned documents do not clarify under which level of *mens rea* or degree of force Mr. Bryant acted when he committed the domestic assault.

Mr. Bryant contends that intentionality must be an element of the predicate crime for the crime to fit the definition of "misdemeanor crime of domestic violence" and observes that "recklessness" satisfies the *mens rea* requirement for conviction under § 207. *Id.* at 8. He further notes that one can be convicted of violating § 207 for merely offensive contact, which he argues does not necessarily rise to the level of "use or attempted use of physical force" within the meaning of a "misdemeanor crime of domestic violence."[9] *Id.* at 8-

---

[9] Mr. Bryant discusses *State v. Patterson*, 2004 ME 79, 851 A.2d 521, to demonstrate how minimal the "offensive physical contact" may be under the Maine assault statute. In *Patterson*, a boyfriend arrived home to find a spot in newly-installed carpet. *Id.* 2004 ME 79, ¶ 3, 851 A.2d at 522. He became irritated and commented as he attempted to clean the spot. *Id.* The comments provoked the girlfriend and she took a piece of pizza and rubbed it into the carpet. *Id.* In response, the boyfriend picked up his girlfriend, carried her outside, and left her there. *Id.* Although characterizing the crime as of "a minimal nature," the district judge found the boyfriend guilty of assault and sentenced him to "simply the conviction" and a small fine. *Id.* 2004 ME 79, ¶ 9, 851 A.2d at 523. Although Mr. Bryant does not mention it, the Maine Supreme Judicial Court vacated the conviction and remanded the case based on the District Court's erroneous interpretation of 17-A M.R.S. § 105, which allows a person to use nondeadly force to the extent he reasonably believed it necessary to prevent what reasonably appeared to be an unlawful taking of his property or criminal mischief. Id. 2004 ME 79, ¶ 14-15, 851 A.2d at 524-25.

Mr. Bryant also does not mention that after Patterson was remanded, the case returned to the Maine Supreme Judicial Court. *State v. Patterson*, 2005 ME 55, 881 A.2d 649 (*Patterson II*). After the initial remand, the District Court had reinstated the conviction and Mr. Patterson appealed again. Again the Maine Supreme Judicial Court vacated. *Id.* In *Patterson II* , the Law Court noted that in the context of a section 105 defense, "[b]ecause recklessness is the minimum required mens rea requirement for assault pursuant to 17-A M.R.S. § 207(1)(A), the State was required to prove beyond a reasonable doubt that

10 (citing 18 U.S.C. § 921(a)(33)(A)(ii)); *Def.'s Reply* at 1 (clarifying that his challenge to using a § 207 conviction as a predicate misdemeanor to a § 922(g)(9) charge was based not only on the *mens rea* issue, but also the contention that "offensive contact" does not necessarily amount to "physical force"). This Court has previously addressed these issues and no intervening case law changes the outcome.

1. The First Circuit's Holding in *Nason*

In *United States v. Nason*, the First Circuit rejected the same *mens rea* and level of force arguments Mr. Bryant raises here. 269 F.3d 10 (2001). The *Nason* Court considered whether conduct violating the "offensive physical contact" prong of § 207 "necessarily involves the use or attempted use of physical force" such that convictions under that prong may qualify as predicate offenses under §922(g)(9). Id. at 11-12. It held that "all convictions under [17-A M.R.S. § 207] qualify as misdemeanor crimes of domestic violence within the purview of 18 U.S.C. § 922(g)(9)." *Id.* at 21. The *Nason* Court explained that "Congress intended section 922(g)(9) to encompass crimes characterized by the application of any physical force." *Id.* at 18.

Patterson's beliefs that led to his actions 'when viewed in light of the nature and purpose of [his] conduct and the circumstances known to [him], [were] grossly deviant from what a reasonable and prudent person would believe in the same situation.'" *Patterson II*, 2005 ME 55, ¶ 8, 881 A.2d at 651 (quoting 17-A M.R.S. § 105).

Although Mr. Bryant's point is well taken about the minimal nature of the offensive physical contact that may sustain an assault conviction, the Patterson cases also reflect that a conviction for minimal offensive physical contact may be more difficult under Maine law than Mr. Bryant allowed.

Mr. Bryant argues that *Nason* "does not address the intent issue presented by Congress's selection of the term 'use of force.'" *Def.'s Mot.* at 11. The Court disagrees. In *Nason*, the First Circuit reviewed the decisions of the Maine Supreme Judicial Court, which addressed "offensive physical contact" under § 207, and concluded that the phrase involves "something less than bodily injury" but more than "mere touching." *Nason* 269 F.3d at 19 (quoting *State v. Pozzouli*, A.2d 745 (Me. 1997)). The First Circuit cited § 207's "*mens rea* requirement" as one of the distinctions between offensive physical contact and mere touching. *Id.* In other words, the *Nason* Court considered § 207's *mens rea* requirement as a factor harmonizing its elements with the definition of misdemeanor crime of domestic violence. Moreover, although Mr. Bryant emphasizes the word "use" preceding the phrase "physical force," suggesting it supplies an intentionality element to the definition of misdemeanor crime of domestic violence, *see Def.'s Mot.* at 9, the *Nason* Court found that "offensive physical contacts with another person's body categorically involve the use of physical force." 269 F.3d at 20. Because knowing and reckless are expressly sufficient *mentes reae* for offensive physical contact under § 207, the First Circuit implicitly rejected the idea that intentionality is an essential element of "use of physical force."

Finally, Mr. Bryant cites no First Circuit case law for the assertion that intentionality is a required element of misdemeanor crimes of domestic violence. Although he points to the case law of other circuits, which have focused on the level of force necessary to constitute "physical force," *see Def.'s Mot.* at 9-11 (citing *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008) and *United States v. Belless*, 338 F.3d 1063 (9th

Cir. 2003)), Mr. Bryant has not directed the Court to any circuit discussion of intentionality. *Id.* In short, the Court remains bound by First Circuit precedent and is unconvinced that the decisions of other circuits presage a change in First Circuit law sufficient to "loosen the iron grip of *stare decisis*." *United States v. Reveron Martinez*, 836 F.3d 684, 687 n.2 (1st Cir. 1988). In fact, in *United States v. Duval*, 496 F.3d 64, 84-85 (1st Cir. 2007), addressing the meaning of "violent felony" under the ACCA, a three-judge panel of the First Circuit itself observed that "[u]ntil such time as we revisit *Nason en banc*, we are bound to apply its holding that even 'offensive contact' constitutes a violent felony under Maine's assault and battery statute." (internal citation omitted).

2. Developments in the Law Since *Nason*

Mr. Bryant argues that intervening case law has overruled *Nason*. His argument highlights the term "physical force", which appears in the ACCA and in the definition of misdemeanor crime of domestic violence. The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that

> (i) has as an element the use, attempted use, or threatened use of *physical force* against the person of another; or
>
> (ii) is a burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B) (emphasis supplied). As noted earlier, the statutory definition of misdemeanor crime of domestic violence contains the same term: "an offense that . . . has, as an element, the use or

attempted use of *physical force* . . . ." 18 U.S.C. § 921(a)(33)(A) (emphasis supplied). Mr. Bryant says that the Court must apply judicial interpretations of "physical force" under the ACCA to "physical force" under the definition of misdemeanor crime of domestic violence and that when the same interpretation is applied, Mr. Bryant's state conviction cannot serve as a predicate crime for a conviction under 18 U.S.C. § 922(g)(9).

Mr. Bryant's argument is premised on his assertion that in *Johnson v. United States*, 130 S. Ct. 1265 (2010), the Supreme Court effectively overruled *Nason*. In *Johnson*, the Court held that a defendant's prior battery conviction under Florida law was not a "violent felony" under the ACCA. *Id.* at 1265. The *Johnson* Court stated that, "in the context of a statutory definition of 'violent felony' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 1272 (citing *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003)). The *Johnson* Court held that such force was not a prerequisite for conviction under Florida's battery statute, which could be "satisfied by *any* intentional physical contact, 'no matter how slight.'" *Id.* at 1269-1270 (quoting *State v. Hearns* 961 So. 2d 211, 218 (Fla. 2007)).

For support, Mr. Bryant points to some stray judicial comments anticipating that in interpreting the meaning of "violent felony" in the ACCA, the Supreme Court might illuminate the meaning of "misdemeanor crime of domestic violence." *See Def.'s Mot.* at 9-13; *see also Duval*, 496 F.3d at 85 (incorporating the First Circuit's reasoning in *Nason* to its review of a district courts determination "that a conviction in Maine for simple assault constitutes a

crime of violence for the purposes of the ACCA"); *United States v. Pettengill*, 682 F. Supp. 2d 49, 57-58 (D. Me. 2010) (addressing defendant's request that the motion be held in abeyance pending the disposition of Johnson, the Court noted that "there is no guarantee that when the Supreme Court issues its opinion in *Johnson*, it will resolve the issues before the Court"); *United States v. Wyman*, 667 F. Supp. 2d 151, 154 n.4 (D. Me. 2009) ("Though not precisely the same question presented here or in *Booker*, the Supreme Court's decision in *Johnson* could inform the First Circuit's position in *Nason*"). More specifically, Mr. Bryant argues that *Duval* established that "the ACCA must be read in the same manner as § 922(g)(9)." *Def.s Mot.* at 13.

The Court disagrees. In *Duval*, the First Circuit reviewed a district court's determination that a defendant's conviction under § 207 constituted a violent crime for purposes of the ACCA. 496 F.3d at 84-85. The *Duval* Court explained that it reviewed the district court's determination for "plain error." Under that standard, it was the defendant's burden to show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citing *United States v. Bennett*, 469 F.3d 46, 51 (1st Cir. 2006)). Noting that *Nason* was the only case cited by either party for guidance on the interpretation of § 207, the *Duval* Court stated that it could not "distinguish it in any meaningful way from the circumstances of [the defendant]'s case," and concluded that it was "bound to apply its holding that even 'offensive contact' constituted a violent felony under Maine's assault and battery statute." *Id.* at 85. Moreover, the *Duval* Court concluded that *Nason* was

still binding law in the First Circuit. *Id.* The Court does not read *Duval*, as Mr. Bryant suggests, as mandating a wholesale importation of its construction of the ACCA into the definition of "misdemeanor crime of domestic violence." Rather, the *Duval* Court's decision was grounded on the twin doctrines of plain error and *stare decisis*. *Id.* at 84-85.

Nor would Mr. Bryant's argument find support in *Johnson*. The *Johnson* Court's construction of "physical force" in the ACCA context is narrower than the First Circuit's construction of "physical force" in the § 921(a)(33)(A) context, which includes "any physical force, regardless of whether that force resulted in bodily injury or risk of harm." *Nason*, 269 F.3d at 16-17. In *Johnson*, the Supreme Court strongly indicated that the respective statutes harbor distinct meanings of "physical force." The *Johnson* Court emphasized that its holding was limited to the definition of "physical force" in the context of the ACCA. 130 S. Ct. at 1271-1273. It expressly stated that "[w]e do not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence. The issue is not before us, so we do not decide it." *Id.* at 1273. The Supreme Court, therefore, expressly declined to endorse Mr. Bryant's view that the phrase "physical force" has the same meaning in both contexts.

Moreover, the *Johnson* Court's emphasis of the word "misdemeanor" highlights the distinction between two separate statutory meanings of physical force: (1) physical force as an element of a violent felony and (2) physical force as an element of a misdemeanor crime of domestic violence. The two meanings are elements of distinct categories of crimes assigned separate levels of criminality. It stands to reason that

the degree of force Congress deemed necessary to constitute an element of a violent felony is greater than that necessary to constitute a misdemeanor.

To the extent *Johnson* addressed the question, the Supreme Court suggested that the same phrase in the two statutes could have different meanings. The *Johnson* Court elaborated on the variant meanings of "physical force." It noted that an element of the common law crime of battery was "the intentional application of unlawful force against the person of another." *Id.* at 1270. The element could be "satisfied by even the slightest offensive touching." *Id.* The Supreme Court determined that the common law definition did not fit the ACCA context where the term "force" was accompanied by the modifiers "physical" and "violent." *Id.* at 1271. The Supreme Court also attributed significance to the term "felony" in the ACCA meaning. *Id.* It observed that "even today a simple battery—whether of the mere-touching or bodily-injury variety—generally is punishable as a misdemeanor," and concluded that "[i]t is unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of misdemeanor." *Id.* 1271-72. That "physical force" "normally connotes force strong enough to constitute 'power'" is "all the more so when it is contained in a definition of 'violent felony.'" *Id.* This reasoning indicates the Supreme Court's recognition that Congress assigns the term "force" different meaning in the felony context than in the misdemeanor context.

For the same reason, the First Circuit's holding in *United States v. Holloway*, 630 F.3d 252 (1st Cir. 2011), does not disturb its holding in *Nason*. In *Holloway*, the First Circuit considered "whether a

federal court may conclude that a conviction under Massachusetts's simple assault and battery statute qualifies as a violent felony under the ACCA." *Id.* at 254. It is true, as Mr. Bryant contends, that following *Johnson*, the First Circuit overruled *United States v. Mangos*, 134 F.3d 460 (1st Cir. 1998), which had held that "did assault and beat" charging language "suffices to identify the harmful brand of battery for purposes of sentencing under either the ACCA or the career offender provision of the U.S. Sentencing Guidelines." *Holloway*, 630 F.3d at 257. The *Holloway* Court concluded that in view of Johnson and Massachusetts state interpretations of the scope of the assault and battery statute, "a sentencing court may not rely on the generic 'did assault and beat' charging language to identify which particular battery offense served as the offense of conviction." *Id.* at 260.

Holloway is no more than the First Circuit's declared allegiance to the Supreme Court's directive in *Johnson*. As the Government correctly observes, "[t]here was simply no discussion of § 922(g)(9) or any attempt to define misdemeanor crime of domestic violence." *Id.* After *Johnson*, the Court will not incorporate the construction of "physical force" under the definition of "violent felony" in the ACCA to its analysis of "physical force" under the definition of "misdemeanor crime of domestic violence" in the firearms possession prohibition.

In sum, the holding in *Nason* that "all convictions under [17-A M.R.S. § 207] qualify as misdemeanor crimes of domestic violence within the purview of 18 U.S.C. § 922(g)(9)," 269 F.3d at 21, remains the law in this Circuit and binding on this Court. *Holloway*, 630 F.3d at 258. Therefore, the indictment states a federal

offense because Mr. Bryant is alleged to have possessed ammunition after having been convicted of a recognized predicate offense.

III. CONCLUSION

The Court DENIES Mr. Bryant's Motion to Dismiss the Indictment (Docket # 20).

SO ORDERED

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 13th day of April, 2011

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal No. 11-CR-00017-B-W

UNITED STATES OF AMERICA

v.

STEPHEN L. VOISINE

CONDITIONAL PLEA
(Rule 11(a)(2))

My plea of guilty is conditional in that I reserve the right, on appeal from the judgment herein, to have an appellate court review this court's decision dated April 14, 2011, on my Motion to Dismiss Count One of the information.

Date: 4/22/2011 /s/ Stephen L. Voisine
Stephen L. Voisine, Defendant

Date: 3 May 2011 /s/ Virginia Villa
Virginia G. Villa, Esq.
Attorney for Defendant

The government hereby consents to the defendant's conditional plea.

Date: 5-5-11 /s/ F. Todd Lowell
F. Todd Lowell
Supervisory Assistant U.S. Attorney

The court hereby approves the defendant's conditional plea.

Date: June 13, 2011

/s/ John A. Woodcock Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2011 I mailed by United States Postal Service, the document(s) to the following defense counsel:

Virginia Villa, Esq.

THOMAS E. DELAHANTY II
United States Attorney

/s/ F. Todd Lowell
F. Todd Lowell
Supervisory Assistant U.S. Attorney
United States Attorney's Office
202 Harlow Street, Suite 111
Bangor, ME 04401
(207) 945-0373
todd.lowell@usdoj.gov

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

[Filed 03/01/12]

Criminal Action
Docket No. 1:11-cr-00017-JAW-1
Conditional Guilty Plea

UNITED STATES OF AMERICA

vs.

STEPHEN L. VOISINE,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Pursuant to notice, the above-entitled matter came on for CONDITIONAL GUILTY PLEA before the HONORABLE JOHN A. WOODCOCK, JR., Chief District Judge, in the United States District Court, Bangor, Maine, on the 13th day of June, 2011, at 10:13 a.m.

APPEARANCES:

For the Government: F. Todd Lowell, Esquire

For the Defendant: Virginia G. Villa, Esquire

Julie G. Edgecomb, RMR, CRR
Official Court Reporter

Proceedings recorded by mechanical stenography; transcript produced by computer.

[2] (Defendant present with counsel in open court.)

THE COURT: All right. This is the matter of the United States versus Stephen L. Voisine, which is 11-cr-17-B-W.

Would counsel please enter their appearances.

MR. LOWELL: Todd Lowell for the government, Your Honor.

MS. VILLA: Virginia Villa for Mr. Voisine, who is present. Good morning, Your Honor.

THE COURT: Good morning. Mr. Voisine, would you state your name.

THE DEFENDANT: Stephen Voisine, Sr.

THE COURT: Mr. Voisine, the purpose of the hearing is for me to make sure that you understand what you're doing and also that you're doing what you're doing of your own free will.

THE DEFENDANT: Yes, sir.

THE COURT: In other words, what you're doing today must be both knowing and voluntary. To that end, I'm going to start by asking some questions because I want to be sure you're competent.

How old are you, Mr. Voisine?

THE DEFENDANT: 50.

THE COURT: How far did you go in school?

THE DEFENDANT: Tenth grade.

[3] THE COURT: You're taking a number of medicines. Your -- your lawyer has given me a list of medicines that you're taking. Have you taken all your prescribed medicines within the last 24 hours in their regular doses?

THE DEFENDANT: Yes, I have, sir.

THE COURT: Do you believe that your taking these medicines has any impact on your ability to understand these matters? Do you believe the fact your having medicine -- listen to my question.

THE DEFENDANT: Yes.

THE COURT: My question is --

THE DEFENDANT: Yes.

THE COURT: What I'm interested in is whether or not you are affected by the medicine so that you can't understand me.

THE DEFENDANT: No, sir.

THE COURT: Okay. So you take these medicines all the time, right?

THE DEFENDANT: Yeah.

THE COURT: And you take them the way the doctors tell you to take them.

THE DEFENDANT: Hm-hmm.

THE COURT: Right?

THE DEFENDANT: (Nodding head up and down.)

MS. VILLA: Say yes or no.

[4] THE DEFENDANT: Yes, sir.

THE COURT: And you've gotten used to it so that it doesn't affect your mental process, right?

THE DEFENDANT: Right.

THE COURT: You can understand what goes on despite the fact you take all these medicines?

THE DEFENDANT: Yes, sir.

THE COURT: Have you failed to take any medicine that a doctor has told you you should take?

THE DEFENDANT: No, sir.

THE COURT: Mr. Voisine, have you used any drugs or alcohol in the last 24 hours other than these medicines?

THE DEFENDANT: No, sir.

THE COURT: Do you believe you understand what's happening?

THE DEFENDANT: Yes, sir.

THE COURT: Has Ms. Villa explained to you the consequences that may flow from these proceedings?

THE DEFENDANT: Yes, sir.

THE COURT: Ms. Villa, has anything come to your attention that casts any doubt on your client's competence?

MS. VILLA: No, Your Honor.

THE COURT: The court having observed the defendant in making his answers and his demeanor and manner and attitude, and the court having observed the defendant does not [5] appear to be under the influence of medicine, drugs, or any other substance that may affect his judgment, I find the defendant is competent.

Now, Mr. Voisine, have you been provided with a copy of the proposed information setting forth the charges the government is bringing against you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the charges being made against you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you consulted with Ms. Villa about these charges and has she explained them to you?

THE DEFENDANT: Yes, sir.

THE COURT: Ms. Villa, are you satisfied your client understands the nature and significance of the charges made against him in the proposed information?

MS. VILLA: Yes, Your Honor.

THE COURT: Do you approve of the defendant's waiver of indictment in this matter?

MS. VILLA: Yes, Your Honor. I believe that we've already done that.

THE COURT: Oh.

MS. VILLA: The information was filed back in March, and he waived his right to indictment at the time of the filing, and we did it that way to allow the government to [6] avoid the process of going in front of a grand jury; But he didn't plead at that time because I had to file the motion to dismiss, which now we're --

THE COURT: Oh, okay, okay. Have you -- okay. So we'll go right to the guilty plea. Does the -- the -- I understand that your client is going to enter a conditional plea to Count 1 and plead guilty without condition to Count 2; is that right?

MS. VILLA: That is correct.

THE COURT: Your -- it seems that the issues that you brought in the motion to dismiss have been resolved by the the First Circuit in the case of *United States v. Booker*.

MS. VILLA: There is a rehearing petition pending in that case, Your Honor.

THE COURT: Okay. So I understand correctly that your client is ready for arraignment on the information?

MS. VILLA: Yes, Your Honor.

THE COURT: And I understand correctly that he intends, on arraignment, to tender a conditional plea of guilty to Count 1 and a plea of guilty to Count 2; is that correct?

MS. VILLA: Yes, Your Honor.

THE COURT: Now, Mr. Voisine, have you had an adequate opportunity to discuss the charges in both Count 1 and Count 2 with your attorney?

[7] THE DEFENDANT: Yes, sir.

THE COURT: Clerk may inquire.

THE CLERK: Stephen L. Voisine, you are charged in a two-count information bearing Criminal No. 11-17-JAW. How do you plead to Count 1 of the information, do you plead -- do you conditionally plead guilty or not guilty?

THE DEFENDANT: Conditionally guilty.

THE CLERK: And how do you plead to Count 2 of the information, do you plead guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: The defendant conditionally pleads guilty to Count 1 of the information and guilty to Count 2 of the information, Your Honor.

THE COURT: Thank you.

Now, Mr. Voisine, have you conditionally pleaded guilty to Count 1 and pleaded actually guilty to Count 2 without condition of this information because you are actually guilty of those crimes subject to the conditional plea?

THE DEFENDANT: Yes, sir.

THE COURT: And, Ms. Villa, subject to the conditional plea on Count 1, are you satisfied your client has pleaded guilty because he is actually. guilty?

MS. VILLA: Yes, Your Honor.

THE COURT: Mr. Voisine, has your attorney explained to you the elements and the nature of each of the offenses [8] charged?

THE DEFENDANT: Yes, sir.

THE COURT: Has she also told you about the penalties that can be imposed?

THE DEFENDANT: Yes, sir.

THE COURT: Ms. Villa, are you satisfied your client understands the charges contained in Counts 1 and 2 of the information and the penalties that can be imposed?

MS. VILLA: Yes, Your Honor.

THE COURT: So that it's clear for -- clear to you, Mr. Voisine, when I'm referring to Count 1 -- and I'm sure you understand this -- I'm referring to the allegation that the government has made --

THE DEFENDANT: Hm-hmm.

THE COURT: -- that on October 18, 2009, you possessed a firearm, namely, a Remington rifle, after having been convicted of a crime of domestic violence. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And when I'm referring to Count 2, I'm referring to the allegation in the information that on the same day, October 18, 2009, you shot and killed a bald eagle. Do you understand that that is the allegation in Count 2?

THE DEFENDANT: Yes, sir.

THE COURT: And it is Count 1 that you're pleading [9] conditionally guilty to. In other words, your lawyer has filed a motion to dismiss Count 1, and she is planning to raise legal issues that the court has already ruled on here on appeal to a higher court. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: So you are, by entering the conditional plea of guilty, agreeing that in the event the First Circuit Court of Appeals or the United States Supreme Court, for that matter, concludes that I am correct, that for all other purposes under the law you will be found guilty. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: On the other hand, if your lawyer is right and she successfully appeals Count 1 to the First Circuit Court of Appeals, or the United States Supreme Court, then the matter will be sent back down here to me, and I will allow, depending on what the court rules, you to withdraw your plea of guilty to Count 1. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, what you're doing today on Count 1 is all dependent upon ultimately what the appellate courts do, what the judges in the

higher courts do about the legal issue that your lawyer is raising. Do you understand that?

THE DEFENDANT: Yes, sir.

[10] THE COURT: And if it turns out that they affirm my ruling, you'll be found guilty and sentenced and that will be the end of the story. You understand that.

THE DEFENDANT: Yes, sir.

THE COURT: But if they overturn me and they find that I committed legal error, then the matter will be sent back down here, and we'll review what happens at that point based on what they tell us to do. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, turning to Count 2, it's a different story. You understand that. You understand that it's different --

THE DEFENDANT: Yes, sir.

THE COURT: -- with Count 2. You don't have, any legal issues about Count 2, which is the bald eagle count.

THE DEFENDANT: Hm-hmm.

THE COURT: Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, you're pleading guilty today period, and you're not preserving any legal issues on the bald eagle count. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: So you'll proceed to sentence on that count. You understand.

THE DEFENDANT: Yes, sir.

[11] THE COURT: And you'll be sentenced, right?

THE DEFENDANT: Yes, sir.

THE COURT: And you will not be able to appeal that count -- the bald eagle count -- to a higher court on the basis of any -- on the basis -- you have not reserved the right to appeal any issues on Count 2, the bald eagle count, to a higher court. You understand that.

THE DEFENDANT: Yes, sir.

THE COURT: Now, it's important for you to realize this because it's a little bit complicated -- it's not too complicated, but it's a little bit complicated -- because on one count, you've reserved the right to appeal and to challenge it and on the other you haven't. You understand that.

THE DEFENDANT: Yes, sir.

THE COURT: Now, I'm going to ask you to listen carefully, then, to what I talk -- what I tell you about the penalties here because the penalties are different. Regarding the possession of the firearm count -- Mr. Voisine?

THE DEFENDANT: Hm-hmm.

THE COURT: Regarding the possession of the firearm count, you're subject to the following maximum ranges of penalties. You're subject to being placed in jail for a period not to exceed ten years. You're subject to a fine not to exceed $250,000, and it can be both prison and a fine.

[12] THE DEFENDANT: Hm-hmm.

THE COURT: Yes?

THE DEFENDANT: Yes, sir.

THE COURT: You can't say hm-hmm.

THE DEFENDANT: I said, yes, sir.

THE COURT: Okay.

MS. VILLA: Sir, my client has a very bad back, and I know that it is bothering him. It may be able -- or he may be able to place more concentration on these proceedings if he were allowed to sit through them.

THE COURT: All right. You can sit if you'd prefer.

THE DEFENDANT: Thank you, sir.

THE COURT: But I want you to listen to me.

Mr. Voisine?

THE DEFENDANT: Yes, sir.

THE COURT: I'm not sure I'm getting your attention. You seem to be distracted. Are you distracted today?

THE DEFENDANT: Well, not too -- too much, sir.

THE COURT: Well, I want you to listen to me.

THE DEFENDANT: (Nodding head up and down.)

THE COURT: What I'm telling you is very important for you.

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, sir.

[13] THE COURT: I'm trying to tell you what your rights are, and you seem distracted, and I want you to listen carefully to me. I don't want you to start looking around and having your mind wander. This is too important.

THE DEFENDANT: Hm-hmm, yes, sir.

THE COURT: I'm going to go back. There are two different crimes here: One is the possession crime; and the other is the bald eagle crime.

THE DEFENDANT: Yes, sir.

THE COURT: Regarding the possession crime, you're subject to the following maximum penalties. You're subject to being placed in prison for a period not to exceed ten years. You're subject to a fine not to exceed $250,000, and it can be both prison and a fine. Following any term of imprisonment, you're subject to a period of supervised release not to exceed three years. If you were to violate a term of supervised release, you could go back to jail for a period not to exceed two years, and you're subject to a special assessment of a hundred dollars.

THE DEFENDANT: Hm-hmm.

THE COURT: Do you understand all of that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, turning to the bald eagle crime, this is the one that you have entered a straight plea of guilty to without any conditions. Do you understand?

[14] THE DEFENDANT: Yes, sir.

THE COURT: These are the maximum penalties. You're subject to being placed in prison for a period not to exceed one year. You're subject to a fine not to

exceed a hundred thousand dollars, and it can be both prison and a fine.

THE DEFENDANT: Yes, sir.

THE COURT: Following any term of imprisonment, you're subject to a period of supervised release not to exceed one year.

THE DEFENDANT: Yes, sir.

THE COURT: If you were to violate a term of supervised release, you could go back to jail for a period not to exceed two years.

THE DEFENDANT: Yes, sir.

MS. VILLA: I think it's one year, Your Honor, because it's a one-year maximum.

THE COURT: It doesn't sound -- it doesn't sound right that he could go back to jail for a period to exceed the amount of the maximum under the original.

MS. VILLA: I'm sorry. I didn't catch that on the -- the synopsis, but I believe it's one year.

THE COURT: Yeah, I think -- I think the synopsis misstates it as not More than two years. I think it's actually one year; is that right, Mr. Lowell?

MR. LOWELL: I'll just confirm that, Your Honor.

[15] Yes, Your Honor, that would be a year.

THE COURT: Okay. So let's go back. Count 2, bald eagle count. You're subject to being placed in prison for a period not to exceed one year. You're subject to a fine not to exceed a hundred thousand dollars. Following any term of imprisonment, you're subject to a period of supervised release not to exceed one year. If you were to violate a term of supervised release, you could go

back to jail for a period not to exceed one year. And you're subject to a special assessment of $25.

THE DEFENDANT: Hm-hmm.

THE COURT: Do you understand that these are the maximum ranges of penalties that may be applicable to the crimes in Count 1 and Count 2?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Lowell, what's the -- is there any issue with the gun here?

MR. LOWELL: No, Your Honor, there's no issue with respect to a forfeiture proceeding.

THE COURT: All right.

MR. LOWELL: Thank you.

THE COURT: Now, Mr. Voisine, I want you to understand, as I suspect you do, that there is no legal requirement that you come into court today and plead guilty. Do you understand that?

[16] THE DEFENDANT: Yes, sir.

THE COURT: In other words, if you were to tell me right now that you were having second thoughts and that you wanted more time to think about this, you wanted more time to talk to your lawyer about it, you wanted more time to investigate the circumstances of the case, to review the police reports, or if you just said to me, for any reason, that you wanted more time, I would let you withdraw your guilty plea and your conditional guilty plea right now. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You're going to have the right to change your mind and plead not guilty up until the

time today that I accept your guilty plea if I do decide to accept it. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: I'm going to take a moment, Mr. Voisine, and tell you about the legal rights that you're waiving or giving up by pleading guilty.

You have the right to trial by jury. You have the right to the assistance of your lawyer at such a trial. If you cannot afford a lawyer, you would have the right to have a lawyer appointed for you at government expense. Do you understand?

THE DEFENDANT: Yes, sir.

[17] THE COURT: At trial, you would be presumed innocent of both charges, and the government would have the burden of proving that you are guilty beyond a reasonable doubt, and you would not have the burden of proving that you're not guilty. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: At trial, the government's witnesses would have to come into open court and testify in front of you and your lawyer. Your lawyer would have the opportunity to cross-examine any government witness, to object to evidence the government might offer, and to offer evidence on your behalf. Your lawyer would also have the right to compel the attendance of witnesses at trial who might prove helpful to your case. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you would have the right to testify at trial if you wanted to, but you would also have the right not to testify, and you could not be

required to testify at trial. If you chose not to testify, I would instruct the jury that they could draw no inference or suggestion of guilt from the fact you did not testify. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If I accept your guilty plea, you will have given up your right to a trial and the other rights I've just described to you, and there will be no trial of any kind [18] on these charges. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If I proceed to enter a judgment of guilty and sentence you on the basis of your guilty plea, and if all that happens, except for very limited circumstances, on Count 2, you will have no right of appeal from your conviction. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, turning to Count 1, if I proceed to enter a judgment -- Count 1 is the possession count to which you're entering a conditional plea. If I proceed to enter a judgment of guilty and sentence you on the basis of your guilty plea on Count 1 and if all that happens, except for very limited circumstances, you will have no right of appeal from that conviction, except for the issues that your lawyer has already raised to this court. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I have before me a conditional plea of guilty which has your signature above the signature line for defendant. Do you have that -- a copy of that before you or available to you?

THE DEFENDANT: Yes, sir.

THE COURT: Is that your signature above the signature line for Stephen L. Voisine --

THE DEFENDANT: Yes, sir.

[19] THE COURT: -- defendant?

THE DEFENDANT: Yes, it is, sir.

THE COURT: Did you read this conditional plea before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have an opportunity to talk to Ms. Villa about the meaning of the conditional plea?

THE DEFENDANT: Yes, sir.

THE COURT: Did you sign it voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Did you understand what you were signing?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Lowell, I take it that the government consents to the defendant's conditional plea?

MR. LOWELL: Yes, it does, Your Honor.

THE COURT: Thank you.

Now, Mr. Voisine, as a part of your pleading guilty, I must find there is a factual basis for your guilty plea, and to assure myself there is such a factual basis, I'll be asking you questions about the conduct that gave rise to both of these charges, and you must answer my questions truthfully.

THE DEFENDANT: Hm-hmm.

THE COURT: Do you understand?

THE DEFENDANT: Yes, sir.

[20] THE COURT: In light of all that I've just explained to you, all the rights that you have that you're waiving or giving up by entering these pleas of guilty to the charges contained in Counts 1 and 2 of the information, do you still choose to plead conditionally guilty to Count 1 and guilty to Count 2 of the information?

THE DEFENDANT: Yes, sir.

THE COURT: Now, what I'm going to do is I'm going to ask Mr. Lowell about the evidence that they would bring into this court in the event you were to go to trial, and then I'm going to turn to your lawyer and to you and ask you about that evidence and whether you agree with it or you object to it. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Lowell, I have before me a government's amended version of the offense which is dated June 8, 2011. Does this government's amended version of the offense contain, at a minimum, the evidence that the government would bring to bear if the matter were to go to trial?

MR. LOWELL: Yes, it does, Your Honor.

THE COURT: Thank you.

Ms. Villa, have you had an opportunity to review the government's amended version of the offense?

MS. VILLA: Yes, Your Honor.

[21] THE COURT: Are you satisfied the government can, in fact, produce the evidence contained in the amended version of the offense?

MS. VILLA: Yes, sir.

THE COURT: Are you also satisfied that the admissible part of that evidence would permit a properly instructed jury to determine beyond a reasonable doubt that your client is guilty of each of the crimes to which he is pleading guilty subject to the conditional plea on Count 1?

MS. VILLA: Yes, Your Honor.

THE COURT: Now, Mr. Voisine, would you stand -- you don't need to stand. Have you reviewed the government's amended version of the offense in this case?

THE DEFENDANT: Yes, sir.

THE COURT: This is the document which is dated Sep -- June 8, 2011. Do you have that before you?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Have you read it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand it?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had a chance to consult with your lawyer about it?

THE DEFENDANT: Yes, I have, sir.

THE COURT: Now, this is -- this sets forth, [22] Mr. Voisine, exactly the evidence that the government would present in court if the matter were to go to trial. Do you understand that?

THE DEFENDANT: Yes, sir.

THE. COURT: In other words, it details specifically what it says you did wrong here. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And did you read it carefully?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand what it -- what it says?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I'm going to ask you a very important question, Mr. Voisine, and, obviously, in this courtroom, you must answer my question truthfully. Do you disagree with what the government says happened here in the amended version of the offense?

THE DEFENDANT: Do I disagree?

THE COURT: Yes.

THE DEFENDANT: No, sir.

THE COURT: Is the information set forth in the government's amended version of the offense true to your own personal knowledge?

THE DEFENDANT: Yes, sir.

THE COURT: Based on my review of the government's [23] amended version of the offense, the responses of your lawyer, and your own responses, I find there is a factual basis for the conditional guilty plea to the crime charged in Count 1 of the information and the guilty plea to the crime charged in Count 2 of the information.

Now, the next part of this process is for me to make sure that you're doing what you're doing of your own free will. Has anyone threatened you --

THE DEFENDANT: No, sir.

THE COURT: -- or has anyone attempted to force you to get you in any way to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: I take it there's no plea agreement here?

MR. LOWELL: That's right, Your Honor, other than the conditional plea, Your Honor.

THE COURT: Thank you.

Now, I want you to understand, Mr. Voisine, that at the time of sentencing, the law will permit you and your lawyer and the prosecutor to make recommendations to me regarding sentence, but the authority to determine the appropriate sentence does not rest with them.

THE DEFENDANT: Hm-hmm.

THE COURT: It rests with me as the judge in this court.

[24] THE DEFENDANT: Yes, sir.

THE COURT: And if I do not accept the recommendations of the parties and impose a sentence that's more severe than the one they've recommended, you will still not be allowed to withdraw your guilty pleas. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, the sentencing commission guidelines will be considered by the court in determining your sentence. I have an obligation to calculate the advisory guideline sentence range, to consider increases and decreases in that range, and once I fix the range, I then consider that range as advisory-and sentence you on the basis of certain statutory factors

that are set out in federal law. Have you and your lawyer talked about how the sentencing commission guidelines may affect your sentence?

THE DEFENDANT: Yes, sir.

THE COURT: I can't determine the advisory guideline sentence until after I've read a presentence report that the probation office will prepare and until I've given your lawyer and the prosecutor an opportunity to challenge the facts in the report.

After I determine what guideline does apply to a case, I still have the authority to impose a sentence that is more severe, or it could be less severe, than the sentence called [25] for by the advisory guideline. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, if I do that, if I impose a sentence that's more severe than the one called for by the applicable guideline, you will not be permitted to withdraw your guilty plea. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you and the government will have the right, on both Count 1 and Count 2, to appeal any sentence that I impose. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If a term of imprisonment is imposed, Mr. Voisine, you'll be required to actually serve in a jail or prison all of the imprisonment term, except for good-time deductions --

THE DEFENDANT: Hm-hmm.

THE COURT: -- and you will not be permitted to serve any part of it on parole. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone made any promises to you in an effort to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone made any promise to you as to what kind of sentence I will impose?

THE DEFENDANT: No, sir.

[26] THE COURT: Has anyone made any promises to you as to what the prosecutor's recommendation at sentencing is going to be?

THE DEFENDANT: No, sir.

THE COURT: I ask you finally, then, Mr. Voisine, do you still wish to plead conditionally guilty to the charge contained in Count 1 of the information and guilty without condition to the charge, contained in Count 2 of the information?

THE DEFENDANT: Yes, sir.

THE COURT: And, Ms. Villa, do you, as Mr. Voisine's lawyer, still recommend I accept the guilty plea?

MS. VILLA: I do, Your Honor.

THE COURT: Mr. Stephen L. Voisine, since you acknowledge that you are, in fact, conditionally guilty as charged in Count 1 of the information, and since you acknowledge that you are, in fact, guilty as charged in Count 2 of the information, and since I find there is a factual basis for the pleas, and since I find, based on your responses to my questions and my direct observations, that you are competent to enter a plea, and since I find you know of your right to a trial and the rights associated with a right to a trial, and since I further find you know the maximum possible

punishments that may be imposed if you are convicted, and since I find that you have not been coerced, but that you have [27] voluntarily and knowingly tendered a plea of guilty on a conditional basis to Count 1 and a plea of straight guilty to Count 2 of this information, I now accept your guilty pleas as tendered.

I hereby order the preparation of the customary presentence investigation report.

Mr. Lowell, have you had an opportunity to review the pretrial services report in this case?

MR. LOWELL: The bail report, Your Honor?

THE COURT: Yes, pretrial services report?

MR. LOWELL: Yes, Your Honor. Mr. Voisine has been on bail, and the -- and the government has no objection to his continuing on bail.

THE COURT: All right. Ms. Villa?

MS. VILLA: We would appreciate the continuance so that he may continue to receive medical care, etc., while his sentence is pending.

THE COURT: All right. Now, you've been on bail -- I take it I must have released him on bail the last time?

MS. VILLA: Yes, Your Honor.

THE COURT: Okay. You've been on bail, Mr. Voisine, and there are certain mandatory conditions to your bail. Have you reviewed those carefully?

THE DEFENDANT: Yes, sir.

THE COURT: Have you been complying with them?

[28] THE DEFENDANT: Yes, sir.

THE COURT: Now, you understand that these are orders.

THE DEFENDANT: Hm-hmm.

THE COURT; They're court orders, right?

THE DEFENDANT: Yes, sir.

THE COURT: And you must comply with them.

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you fail to comply with them, you're going to get in more trouble than you ever would at any other time. You understand that.

THE DEFENDANT: Yes, I do, sir.

THE COURT: So you need to comply strictly with the court orders. You understand.

THE DEFENDANT: Yes, I do, sir.

THE COURT: What's going to happen next is that someone from pretrial services will come -- or from the probation department will come by, and they will meet with you, and he or she will interview you, and they'll find out more information about you --

THE DEFENDANT: Hm-hmm.

THE COURT: -- and give that information to me in a report. That information will help me better understand who you are and what you did --

THE DEFENDANT: Hm-hmm.

[29] THE COURT: -- so that I can impose a sentence that is both fair to you and just for society.

THE DEFENDANT: Yes, sir.

THE COURT: Now, once that report has been finished, it will be reduced to writing, and you'll have an opportunity to review it. I'm going to ask that you carefully review the report and make sure it's

accurate, just the way you did with the prosecution version --

THE DEFENDANT: Yes, sir.

THE COURT: -- because I am going to rely on its contents in determining the right sentence to impose upon you, and I don't want to sentence you on the basis of any inappropriate or inaccurate information. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you see anything inaccurate in that report, I'm going to ask that you let your attorney know. You understand?

THE DEFENDANT: Yes, sir,

THE COURT: Once the report has been finalized and any objections have been ruled upon, the matter will be set back here in this courtroom for the imposition of sentence. Do you understand what's going to happen next?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Is there anything further to come before the court at this time from the government?

[30] MR. LOWELL: No. Thank you, Your Honor.

THE COURT: Anything further from the defendant?

MS. VILLA: Nothing. Thank you, Your Honor.

THE COURT: The defendant is released on bail under the same terms and conditions as previously imposed.

Court stands in recess.

(Proceedings concluded at 10:47 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Julie G. Edgecomb
Julie G. Edgecomb, RMR, CRR
Official Court Reporter

March 1, 2012
Date

Not For Publication in West's Federal Reporter

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-1213

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN L. VOISINE,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. John A. Woodcock, *U.S. District Judge*]

Before

Lynch, *Chief Judge*,
Torruella and Stahl, *Circuit Judges*.

Virginia G. Villa, Assistant Federal Public Defender, on brief for appellant.

Renée M. Bunker, Assistant United States Attorney, and *Thomas E. Delahanty II*, United States Attorney, on brief for appellee.

January 18, 2013

Per Curiam. Defendant-Appellant Stephen L. Voisine asks us to reconsider arguments heard in and decided by this court regarding: (1) whether 18 U.S.C. § 922(g)(9) should be construed to exclude a purportedly non-violent offensive physical contact misdemeanor conviction as a predicate offense; and (2) whether applying § 922(g)(9) to such a prior conviction would violate a particular defendant's Second Amendment rights. *See United States v. Booker*, 644 F.3d 12 (1st Cir. 2011); *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001). The Court considered and denied the exact same arguments in *United States v. Armstrong, III*, Case No. 12-1216 (1st Cir. 2012). Since there are no pertinent factual differences distinguishing the instant case from Armstrong, we accordingly incorporate its reasoning here and affirm the district court's denial of Defendant-Appellant's motion to dismiss the indictment.

So Ordered.

* * *

U.S. DISTRICT COURT
DISTRICT OF MAINE (BANGOR)

Criminal Docket For Case #: 1:11-cr-00050-JAW-1

USA

v.

ARMSTRONG

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
		* * *
04/25/2011		INDICTMENT UNSEALED as to WILLIAM E ARMSTRONG, III (mlm) (Entered: 04/25/2011)
		* * *
06/07/2011	19	MOTION to Dismiss *Indictment with Incorporated Memorandum* by WILLIAM E ARMSTRONG, III Responses due by 6/28/2011. (Attachments: # 1 Exhibit A: CR-08-432 Complaint, # 2 Exhibit B: Transcript CR-08-432)(VILLA, VIRGINIA) Modified on 6/7/2011 to add attachment descriptions (jlg). (Entered: 06/07/2011)
		* * *

DATE	NO.	DOCKET TEXT
06/23/2011	22	RESPONSE in Opposition by USA as to WILLIAM E ARMSTRONG, III re 19 MOTION to Dismiss *Indictment* Reply due by 7/7/2011. (MALONE, GAIL) (Entered: 06/23/2011)
		* * *
07/08/2011	27	ORDER denying 19 Motion to Dismiss Indictment as to WILLIAM E ARMSTRONG III (1)- The Court DENIES the Defendants Motion to Dismiss Indictment (Docket # 19). United States v. Booker, No. 09-1810, No. 09-2302, 2011 U.S. App. LEXIS 8925 (1st Cir. May 2, 2011). By JUDGE JOHN A. WOODCOCK, JR. (jlg) (Entered: 07/08/2011)
		* * *
09/08/2011	41	NOTICE OF HEARING as to WILLIAM E ARMSTRONG, III Change of Plea Hearing set for 9/26/2011 01:00 PM in Main Courtroom, Bangor before JUDGE JOHN A. WOODCOCK JR. The defendant will be required to identify every prescription medication he is taking and to specify the dosage and frequency, purpose and effects of the medication. (The same requirement applies to medications prescribed but NOT taken, with an additional requirement that the defendant explain why it was not taken and the consequences of the failure to take it.)

DATE	NO.	DOCKET TEXT
		Failure to do so satisfactorily may result in the judges refusal to accept the plea. Counsel may find it convenient to use a written list for this purpose. Counsel shall file the prosecution version and any plea agreement at least 2 business days prior to the change of plea. (jgw) (Entered: 09/08/2011)
		* * *
09/26/2011	44	Minute Entry for proceedings held before JUDGE JOHN A. WOODCOCK, JR:Change of Plea Hearing held as to WILLIAM E ARMSTRONG, III, Conditional Guilty Plea entered as to Count 1; Plea accepted on Count 1. Same bail ordered continued. (Court Reporter: Julie Edgecomb) (jgw) Modified on 9/26/2011 to include "conditional" language (jgw). (Entered: 09/26/2011)
09/26/2011	45	CONDITIONAL PLEA as to WILLIAM E ARMSTRONG, III (jgw) (Entered: 09/26/2011)
		* * *
02/14/2012	53	Minute Entry for proceedings held before JUDGE JOHN A. WOODCOCK, JR:Sentencing held on 2/14/2012 as to WILLIAM E ARMSTRONG, III. Defendant sentenced to 3 years probation, $2,500.00 fine and $100.00 special assessment. (Court Reporter:

DATE	NO.	DOCKET TEXT
		Julie Edgecomb) (jgw) (Entered: 02/15/2012)
		* * *
02/15/2012	55	JUDGMENT as to WILLIAM E ARMSTRONG, III (1), Count(s) 1, Defendant sentenced to 3 years probation, $2,500.00 fine and $100.00 special assessment. By JUDGE JOHN A. WOODCOCK, JR. (jgw) Modified on 2/15/2012 to correct fine amount (jlg). (Entered: 02/15/2012)
02/15/2012	56	NOTICE OF APPEAL re 55 JUDGMENT by WILLIAM E ARMSTRONG, III. NOTICE TO COUNSEL: A Transcript Report/ Order Form, which can be downloaded from our web site at http://www.med.uscourts.gov/operations/forms/transcript order.pdf MUST be completed and submitted to the Court of Appeals. NOTICE TO COUNSEL: Counsel should register for a First Circuit CMECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel should also review the First Circuit requirements for electronic filing by visiting the CMECF Information section at http://www.cal.uscourts.gov/efiling.htm. (VILLA, VIRGINIA) Modified on 2/15/2012 (jlg). (Entered: 02/15/2012)

DATE	NO.	DOCKET TEXT
		* * *
01/18/2013	61	OPINION of USCA as to WILLIAM E ARMSTRONG, III re 56 Notice of Appeal - Final Judgment, Check for Receipt of Mandate on 2/19/2013. (jgw) (Entered: 01/22/2013)
01/18/2013	62	JUDGMENT of USCA as to WILLIAM E ARMSTRONG, III re 56 Notice of Appeal - Final Judgment (jgw) (Entered: 01/22/2013)
02/21/2013	63	MANDATE of USCA as to WILLIAM E ARMSTRONG, III re 56 Notice of Appeal - Final Judgment. (jlg) (Entered: 02/21/2013)
		* * *
01/30/2015	81	OPINION of USCA as to WILLIAM E ARMSTRONG, III re 56 Notice of Appeal - Final Judgment, Check for Receipt of Mandate on 3/2/2015. (jgw) (Entered: 01/31/2015)
		* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

[Filed 04/13/11]

Criminal No. 11cr50-B-W

UNITED STATES OF AMERICA

v.

WILLIAM E. ARMSTRONG III

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about May 11, 2010, in the District of Maine, defendant

WILLIAM E. ARMSTRONG III

who had been convicted under the laws of the State of Maine of a misdemeanor crime of domestic violence, specifically Domestic Violence Assault, Maine Superior Court (Franklin County docket #FARSC-CR-2008-00432, dated 12-30-08), knowingly possessed in and affecting commerce the following firearms:

1. Remington .22 cal rifle, no serial number;
2. Winchester 12 gauge shotgun, serial #L2207636;
3. Mossberg .410 gauge shotgun, serial #R896740;
4. Norinco SKS 7.62 X 39 mm rifle, serial #25-010344;
5. Marlin .22 cal WMR rifle, serial #02296858;

6. Braztech Rossi Brand .20 gauge shotgun, Serial #SP787449; and
7. Ruger .22 caliber revolver, serial #492214

and the following ammunition:

1. 1162 rounds of .22 caliber ammunition;
2. 133 rounds 12 gauge ammunition;
3. 25 rounds of 20 gauge ammunition;
4. 21 rounds of .410 gauge ammunition;
5. 146 rounds of 7.62 x 39 mm ammunition;
6. 31 rounds of 7 mm ammunition;
7. 89 rounds of .357 magnum caliber ammunition;
8. 2 rounds of .38 caliber ammunition;
9. 1 round of .30-30 caliber ammunition; and
10. 153 rounds of 8 mm ammunition,

In violation of Title 18, United States Code, Section 922(g)(9).

A TRUE BILL,

[redacted]

Grand Jury Foreperson

/s/ [Illegible]
(Assistant) United States Attorney

Date: 4/13/2011

STATE OF MAINE
FRANKLIN, ss

SUPERIOR COURT
LOCATION: FARMINGTON
Docket No: CR-08-432

STATE OF MAINE

v.

WILLIAM E ARMSTRONG

COUNT 1: DOMESTIC VIOLENCE ASSAULT

DOB: [redacted]/1964

SIN: [redacted] 22

[redacted]

PO Box [redacted]

[redacted] ME 04956

G: [redacted] Ht: [redacted] Wt: [redacted] H: [redacted]

E: [redacted] R: [redacted]

COMPLAINT

The undersigned officer, being duly sworn, states upon information and belief that:

COUNT 1: 17-A M.R.S.A. §207-A(1)(A)
Seq No: 11286
DOMESTIC VIOLENCE ASSAULT
CLASS D
ATN/CTN 703784A / 002

On or about December 29, 2008, in New Vineyard, Franklin County, Maine, WILLIAM E ARMSTRONG, did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact to Rosanna

Armstrong. This conduct was committed against a family or household member as defined by 19-A M.R.S.A. §4002(4).

/s/ [Illegible]
COMPLAINANT

Sworn to before me, 12-30, 2008

/s/ Vicki L. Hardy
Clerk/Justice of Peace/
Judge/Justice

OFFICER: Nathan Bean
DEPT: Franklin Sheriffs Dept
ARRAIGNMENT: December 30, 2008
JW#: 8-10782

STATE OF MAINE SUPERIOR COURT
FRANKLIN, SS. CRIMINAL ACTION
Docket No. FARSC-CR-2008-00432

STATE OF MAINE

v.

WILLIAM E. ARMSTRONG, III

(Plea & Sentencing)

BEFORE:

The Honorable Valerie Stanfill, Justice of the Superior Court, in Farmington, Maine, on Tuesday, December 30, 2008.

APPEARANCES:

James Andrews, Esq.
For the State

Linda J. Sparks, Esq.
For the Defendant

[2] (This matter came for hearing before the Honorable Valerie Stanfill, Judge of the District Court, at the Maine District Court, located in Farmington, Maine, on Tuesday, December 30, 2008.)

COURT: We have two matters here today. The first one I have is William Armstrong, and that is Superior Court Docket Number CR-08-432. And are you Mr. Armstrong?

WILLIAM E. ARMSTRONG, III, DEFENDANT: Yes, ma'am.

COURT: And were you here when the tape was played which explains the rights that you have in this matter?

THE DEFENDANT: Yes, ma'am.

COURT: Do you understand those rights?

THE DEFENDANT: Yes, ma'am.

COURT: Did you also have a chance to talk things over with Attorney Sparks?

THE DEFENDANT: A little bit.

COURT: Little bit. I understand.

LINDA J. SPARKS, ESQ.: Yes. We went over the complaint.

COURT: And are you able to waive reading?

MS. SPARKS: Yes, Your Honor.

COURT: Okay. Sir, the complaint that in front of me charges you with a domestic violence assault, Class D; specifically, it's alleged that you assaulted a Rosanna Armstrong, and she's a family or household member as defined [3] by statute. That means that if you were to be convicted of this offense, it does carry with it additional consequences, for example, under federal law and state law with regard to the possession of a firearm or ammunition. Also, if you were to be convicted of this offense, future offenses involving domestic violence could be brought as felonies. It is a Class D offense. That means there's a maximum penalty of three hundred and sixty-four days in jail, as well as a two thousand dollar fine. Do you understand the charge against you?

THE DEFENDANT: Yes, I do.

COURT: And what is your plea?

THE DEFENDANT: Guilty.

COURT: Okay. And do you understand you don't have to plead guilty today?

THE DEFENDANT: Well,--

MS. SPARKS: Yes, we have an offer.

COURT: I--I understand you have an offer. Do you understand you don't have to plead guilty today?

THE DEFENDANT: Yes, ma'am.

COURT: Do you understand that if you pled not guilty today and set--I would set the matter for trial and I would assign you an attorney--appoint you an attorney if you could not afford to hire one? Do you understand that?

THE DEFENDANT: Yes, ma'am.

COURT: And do you understand what the consequences could [4] be of this conviction under federal and state law with regard to the possession of a firearm or ammunition?

THE DEFENDANT: Yes, ma'am.

COURT: And do you understand that any future violations or charges of domestic violence could be brought as a felony if you are convicted of this offense?

THE DEFENDANT: Yes, ma'am.

COURT: Do you understand that you are therefore--if you plead guilty, you are giving up all of the rights that were outlined in--to you by Justice Mead on the videotape. Do you understand that?

THE DEFENDANT: Yes, I do.

COURT: All right. And having in mind all of that, do you still wish to plead guilty today?

THE DEFENDANT: Yes, I do.

COURT: All right. Then I'll enter that plea of guilty and make a finding of guilty. And the recommendation in this case?

JAMES ANDREWS, ESQ.: The recommendation, Your Honor, is a hundred and eighty days to the Franklin County Jail with all but forty-eight hours--strike that, twenty-four hours suspended, probation for a period of one year. Conditions of probation are to include anger management counseling, and he's to have no contact, direct or indirect, with Rosanna Armstrong unless she requests writing--requests contact in writing and [5] provides it to the probation officer.

(Indiscernible conversation)

MS. SPARKS: Yeah, except that I expected that contact was to be, like, today, so it wouldn't be a probation off--

MR. ANDREWS: That's up to--that's up to Ms. Armstrong, Rosanna--

MS. SPARKS: It would be just to the--to the Court or to the DA's office.

MR. ANDREWS: Your Honor, I--I--I think that information can be distributed--so if we want to say it to the Court, the Court which--would have it by today, I guess or we can say it-it--I mean, I think if--

COURT: Well,--

MR. ANDREWS:--the Department of Corrections gets it--

COURT:--and we're really talking two different things. I mean, either--either permission such as permitted by the probation officer, who may or may

not permit it even if it's requested by the alleged victim, or are you simply arguing that it--it be permitted? I mean,--

MS. SPARKS: My understanding--

MR. ANDREWS: It should be permitted at the victim's discretion, not the Department of Corrections discretion. So, I think it should be, but I want it in writing that she wants that contact to occur so that we all know that she has the choice.

[6] COURT: All right. And is that your understanding?

MS. SPARKS: Yeah. Our understanding is that she's gonna just write a letter that says that she wants him to come home and he'll be able to go home immediately or as soon as that comes in to somebody here at the court.

MR. ANDREWS: And that's how we expect it to work.

(Pause)

COURT: Are you gonna say something?

(Pause)

COURT: Use or possession of alcohol?

MR. ANDREWS: We're not asking for those conditions, Your Honor.

COURT: Well, it's a standard condition.

MR. ANDREWS: Is it--

COURT: The question is whether it's used excessively or not.

MR. ANDREWS: Yeah, it would be the standard condition, Your Honor.

MS. SPARKS: I don't believe there was--

MR. ANDREWS: We're not asking for it.

MS. SPARKS:--wasn't any involved.

COURT: It is a standard condition; however, no possession or use of any unlawful drugs or alcohol excessively. And I'm gonna indicate no use or possession of any firearm. What--what--what about dangerous weapons?

[7] MS. SPARKS: This was--

MR. ANDREWS: We're--we're not asking--

MS. SPARKS:--pushing.

MR. ANDREWS:--for the dangerous weapons, Your Honor. The firearms is required by federal law.

COURT: Firearms by operation of law.

MR. ANDREWS: Yeah.

COURT: I think it's actually by operation of state law, but--

UNIDENTIFIED SPEAKER: Really?

COURT: Yeah, I think so.

(Indiscernible conversation)

MR. ANDREWS: Somebody pointed out to me that there is now a three-year suspension for a license on an OUI.

COURT: OUI, second offense.

MR. ANDREWS: They didn't tell us.

COURT: They didn't tell us either. Okay. I will then impose sentence as follows, Mr. Armstrong, you are sentenced to one hundred and eighty days in the Franklin County Jail, all but twenty-four hours

suspended. You are placed on probation for a period of one year. Special conditions of probation include not to own, possess or use any firearms, to complete evaluation and can--and treatment for anger management to the satisfaction of your probation officer, to have no contact direct or indirect or enter the residence, [8] place of work, educational location of Rosanna Armstrong except with--well, I'm gonna cross that out. And then I go on to say further, "Defendant may have contact with Rosanna Armstrong if she so requests in writing to probation officer or DA."

MR. ANDREWS: Thank you, Your Honor.

COURT: There is a ten dollar victim compensation fee that is due on this. When will that be paid?

MS. SPARKS: Do you have ten dollars?

THE DEFENDANT: Tomorrow, ma'am?

COURT: Okay. Okay. You'll have some paperwork to take care of. And other than that, you're okay--you're all set. You understand if you violate any of those terms of probation, you will be made to serve some or all of the hundred and seventy-nine days that is remaining over your head? Do you understand that?

THE DEFENDANT: Yes, Your Honor.

COURT: All right. And you're all set.

END OF HEARING

CERTIFICATION

I HEREBY CERTIFY, that the foregoing, pages 2 through 8, is a true and accurate transcript of Tape Number 3339, Index Numbers 5476 through 5990, recorded at the Maine District Court, located in Farmington, Maine, on Tuesday, December 30, 2008, of the case entitle, *State of Maine v. William E. Armstrong, III*.

Dated: May 17, 2011

/s/ Danielle Beckwith
Danielle A. Beckwith
SUPERVISOR / TRANSCRIBER

A TRUE COPY, dated at Bangor, Maine, this 17th day of May, A.D., 2011.

/s/ Danielle Beckwith
Notary

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal No. 11-50-B-W

UNITED STATES OF AMERICA
v.
WILLIAM ARMSTRONG

CONDITIONAL PLEA
(Rule 11(a)(2))

My plea of guilty is conditional in that I reserve the right, on appeal from the judgment herein, to have an appellate court review this court's decision, dated July 8, 2011, denying my Motion to Dismiss Indictment.

Date: 9/11/2011 /s/ William Armstrong
William Armstrong, Defendant

Date: 14 Sept. /s/ Virginia Villa
Virginia Villa, Esq.
Attorney for Defendant

The government hereby consents to the defendant's conditional plea.

Date: 9-14-11 /s/ Gail Fisk Malone
Gail Fisk Malone
Assistant U.S. Attorney

The court hereby approves the defendant's conditional plea.

Date: September 26, 2011

/s/ [Illegible]
United States District Judge

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal Action
Docket No. 1:11-cr-00050-JAW-1
Conditional Guilty Plea

UNITED STATES OF AMERICA

vs.

WILLIAM E. ARMSTRONG, III,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Pursuant to notice, the above-entitled matter came on for CONDITIONAL GUILTY PLEA before the HONORABLE JOHN A. WOODCOCK, JR., Chief District Judge, in the United States District Court, Bangor, Maine, on the 26th day of September, 2011, at 1:07 p.m.

APPEARANCES:

For the Government: Gail Fisk Malone, Esquire

For the Defendant: Virginia G. Villa, Esquire

Julie G. Edgecomb, RMR, CRR
Official Court Reporter

Proceedings recorded by mechanical stenography; transcript produced by computer.

[2] (Defendant present with counsel in open court.)

THE COURT: We're here in the matter of United States versus William Armstrong, which is 11-cr-50-JAW.

Would counsel please enter their appearances.

MS. MALONE: Gail Malone, Assistant U.S. Attorney, for the government.

MS. VILLA: Virginia Villa for Mr. Armstrong, who is present. Good afternoon, Your Honor.

THE COURT: Good afternoon.

Mr. Armstrong, would you stand. Mr. Armstrong, the purpose of the hearing this afternoon is for me to make sure you understand what you're doing and also to make sure that you're doing what you're doing of your own free will. In other words, everything you do this afternoon must be both knowing and voluntary. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Your name is William Armstrong, III; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Armstrong, how far did you go in school?

THE DEFENDANT: Two years of college.

THE COURT: Your lawyer indicates to me that you have not been prescribed any medications; is that right?

THE DEFENDANT: That's correct, Your Honor.

[3] THE COURT: Have you recently been seeing any doctor or psychiatrist?

THE DEFENDANT: A counselor, Your Honor.

THE COURT: But you're not taking any medicine as a consequence?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you used any drugs or alcohol in the last 24 hours?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you believe you understand what's happening in these proceedings?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The court having observed the defendant in making his answers and his demeanor and manner and attitude, and the court having observed the defendant does not appear to be under the influence of medicine, drugs, or any other substance that may affect his judgment, I find the defendant is competent.

Has Ms. Villa explained to you the consequences that may flow from these proceedings?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And do you authorize Virginia Villa to speak on your behalf this afternoon?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, I understand you wish to [4] conditionally change your plea to Count 1 of the indictment; is that right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Ms. Villa, do you recommend this--do you approve of this conditional change of plea and recommend I accept it?

MS. VILLA: Yes, Your Honor.

THE COURT: The clerk may proceed.

THE CLERK: William E. Armstrong, III, on April 25th, 2011, you entered a plea of not guilty to Count 1 of the indictment bearing Criminal No. 11-cr-50-JAW. How do you now plead to Count 1 of this indictment, do you plead guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: The defendant pleads guilty to Count 1, Your Honor.

THE COURT: Thank you.

Now, I want to take a moment, Mr. Armstrong, and talk to you about what you're doing this afternoon. What you're doing is you're entering into a conditional plea of guilty, and I want to take a moment and explain this to you.

Your lawyer, as I'm sure you know, has challenged whether the facts in your case make it--actually make it illegal for you to possess a firearm. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

[5] THE COURT: In order to effect that challenge, what she has done is she filed a motion to dismiss the indictment. Are you aware that she filed that motion?

THE DEFENDANT: Yes, I am, Your Honor.

THE COURT: Now, in the motion, she made two arguments: The first argument was that your domestic assault conviction under Maine law would not meet the definition of a domestic violence conviction under federal law. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: And she also said, as a second issue, that because the Second Amendment of the Bill of Rights, which is, of course, the right to bear arms, establishes a personal right to bear arms under recent Supreme Court authority, the law under which you have been charged, namely, that you possessed a firearm after having been convicted of a misdemeanor crime of domestic violence, is unconstitutional; that's her position. Do you understand?

THE DEFENDANT: Yes, I do.

THE COURT: Now, do you understand that she wishes to preserve these issues and present them to the Court of Appeals?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: What happened was after she filed the motion to dismiss, I denied the motion to dismiss on both [6] grounds on July 8, 2011, and she wishes to take the question as to whether that denial was correct as a matter of law to the First Circuit Court of Appeals. Do you understand all of this?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, by entering the conditional plea of guilty, you're entering a plea conditioned on the First Circuit's ultimate decision as to whether I was correct in denying the motion to dismiss. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: That means--one way of looking at it is that you have retained the right to have my legal ruling-reviewed by a higher court. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, if I am right, then your conviction for the crime that is charged here, namely, possession of a firearm after conviction for a crime of domestic violence, will be final. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: And, again, if I am right, you will not -- and the First Circuit Court of Appeals determines I'm correct, then you will not have the right to come back here into the court and say, oh, I'd rather revisit that question of my guilty plea that I entered into in September of 2011. Do you understand that?

[7] THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, if I am wrong, we will then get a decision from the appeals court and that would indicate that I'm wrong. Based on what the appeals court says, you would likely have the right to withdraw then your guilty plea. In other words, if the appeals court turned around and said that your attorney is correct, that the charge is fatally defective as a matter of law, then if the Court of Appeals remanded the matter back to this court, in effect, saying that I was wrong and that your attorney was right, then, under the law, you would generally be given the right to withdraw your guilty plea at that time. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: So if I'm right, the decision will be final, and your guilty plea and your conviction will be final, and your sentence will be final. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: But if I am wrong, then we will have the opportunity -- you will have the opportunity to revisit the matter depending on what the First Circuit Court of Appeals says. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, the other aspect I want you to clearly understand about this, Mr. Armstrong, is that your conditional plea of guilty today is limited to the two issues [8] I've just described. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: In other words, if there are other legal issues that are hiding out there in the bushes that have not been raised, you will not be able to raise them on appeal. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: In other words, she has raised two legal issues only, and that's the condition upon which you're entering your guilty plea. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: So when I refer in the future, during the course of this hearing, to your entering a conditional plea of guilty, I'm talking about the discussion we've just had, in effect, that you are entering a plea of guilty, that you're admitting that you committed the crime, and that you understand you will be subject to sentencing, but that you have preserved the right to challenge the legality of the government's indictment on appeal on the two bases we've discussed. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, I'm going to go back because I can't allow you to plead guilty to a crime, obviously, Mr. Armstrong, unless I determine that you have committed it and that you are actually guilty of the crime, and I'm asking [9] you all these questions subject to your right to appeal and challenge the guilty plea.

So my question for you is, have you conditionally pleaded guilty to the charge contained in Count 1 of this indictment because you are actually guilty of that crime and for no other reason?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And, Ms. Villa, are you satisfied that, subject to the conditional right to challenge the guilty plea, that your client has pleaded guilty because he is actually guilty?

MS. VILLA: Yes, Your Honor.

THE COURT: Now, Mr. Armstrong, have you received a copy of the indictment in this case setting--setting forth the charge?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: Have you had enough time to discuss the charge with your attorney?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: Has Ms. Villa explained to you the elements and the nature of the offense charged?

THE DEFENDANT: Yes, she has, Your Honor.

THE COURT: Has she also told you about the penalties that may be imposed?

THE DEFENDANT: Yes, she has, Your Honor.

[10] THE COURT: Ms. Villa, are you satisfied that your client understands the charge contained in Count 1 of the indictment and the penalties that may be imposed?

MS. VILLA: Yes, Your Honor.

THE COURT: Now, you are charged in a one-count indictment. That indictment alleges that on or about May 11, 2010, in the District of Maine, which means the state of Maine, you, William E. Armstrong, III, who had been convicted under the laws of the state of Maine of a misdemeanor crime of domestic violence, specifically, domestic violence assault, Maine Superior Court, Franklin County, Docket No. FARSC-CR-2008-432, dated December 30, 2008, knowingly possessed in and affecting commerce the following firearms, and it lists seven separate firearms with the following ammunition, and it lists a number of different types of ammunition, all in violation of federal criminal law. Do you understand the charge set forth in the indictment?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, by pleading conditionally guilty to this crime, you're subject to the following maximum ranges of penalties. You're subject to being placed in prison for a period not to exceed ten years. You're subject to a fine not to exceed $250,000, and it can be both prison and a fine. Following any term of imprisonment, you're subject to being placed on supervised release for a period not to exceed three [11] years. If you were to violate a term of supervised release, you could go back to jail for a period not to exceed two years for each violation. You're subject to a special assessment of $100, and you may be subject to a forfeiture of all the firearms that the court

determines are involved in this case. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, Mr. Armstrong, I'm sure you understand this, but I want to be sure for the--clear for the record that you do. You do understand that the law does not require you to come into court today and plead guilty. Do you understand that, sir?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: In effect, what that means, if you were to tell me right now that you were having second thoughts and you wanted more time to think about this case, more time to consult with your attorney, more time for whatever reason, and you told me right now that you wanted to withdraw your guilty plea, I would let you withdraw your guilty plea. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, you're going to have the right to withdraw your conditional plea of guilty up until the time today that I accept your conditional plea if I do decide to accept it. Do you understand?

[12] THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, Mr. Armstrong, I'm going to take a moment and review with you some of the other rights that you have that you're waiving or giving up by pleading guilty.

You have the right to trial by jury. You have the right to the assistance of your lawyer at such a trial, and if you cannot afford a lawyer, you would have the right to have a lawyer appointed for you at government expense. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: At trial, Mr. Armstrong, you would be presumed innocent, and the government would have the burden of proving that you are guilty beyond a reasonable doubt, and you would not have the burden of proving that you're not guilty. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, at trial, the government's witnesses would have to come into open court and testify in front of you and your lawyer. Your lawyer would have the opportunity to cross-examine any government witness, to object to evidence the government might offer, and to offer evidence on your behalf. Your lawyer would also have the right to compel the attendance of witnesses at trial who might prove helpful to your case. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

[13] THE COURT: Now, you would have the right to testify at trial if you wanted to, but you would also have the right not to testify, and you could not be required to testify at trial. If you chose not to testify, I would instruct the jury that they could draw no inference or suggestion of guilt from the fact you did not testify. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, if I accept your guilty plea, you will have given up your right to a trial and the other rights I've just described to you, and there will be no trial of any kind on this indictment. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, if I proceed to enter a judgment of guilty and sentence you on the basis of your guilty plea, and if all that happens, except for very limited circumstance--circumstances and except for the rights that I've just described to you relating to your conditional plea of guilty, you will have no additional right of appeal from your conviction. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, as a part of your pleading guilty, I must find there is a factual basis for your guilty plea, and to assure myself there is such a factual basis, I'll be asking you questions about the conduct that gave rise to this charge, and you must answer my questions truthfully, Do you [14] understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: In light of all that I've just explained to you, Mr. Armstrong, all the rights that you have that you're waiving or giving up by pleading guilty, do you still choose to plead conditionally guilty to the charge contained in Count 1 of the indictment?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: You may be seated.

Ms. Malone, I have before me a prosecution version in this case which is dated September 20, 2011. Does this prosecution version contain, at a minimum, the evidence the government would bring to bear if the matter were to go to trial?

MS. MALONE: Yes, Your Honor, although defense counsel brought a minor correction to my attention before the plea, which I'd like to pass on to the court. In the last sentence of the very first paragraph, it says, the victim of the state conviction was Rosanna

Armstrong, his wife, by whom he then had one child. My math was wrong, and he had two children. Both of his children had been born by that time, so we have edited it to say, by whom he has two children.

THE COURT: He had two children, yeah. By the time of his guilty plea on December 30, 2008, he had two children.

MS, MALONE: And still does.

[15] THE COURT: Sure. Well, you wouldn't -- you wouldn't put has.

MS. MALONE: Which is --

THE COURT: You're trying to establish what he had back then, right, at the time of the -- at the time of the December 30, 2008 conviction?

MS. MALONE: Yes, Your Honor.

THE COURT: Okay.

MS. MALONE: With that amendment, this is what the government would bring to bear if the case were to go to trial.

THE COURT: Thank you very much, Ms. Malone.

Ms. Villa, have you had an opportunity to review the prosecution version as it has just been amended?

MS. VILLA: Yes, Your Honor.

THE COURT: Are you satisfied the government can, in fact, produce the evidence that's contained in the prosecution version as amended?

MS. VILLA: Yes, sir.

THE COURT: Are you also satisfied, Ms. Villa, that the admissible part of that evidence would permit a properly instructed jury to determine beyond a

reasonable doubt that your client is guilty of the crime to which he is pleading guilty subject to your conditional plea of guilty?

MS. VILLA: Yes, sir, it would.

[16] THE COURT: Now, Mr. Armstrong, would you stand again. Mr. Armstrong, you just heard the conversation I had with Ms. Malone, the prosecutor in this matter, and the issue here is a minor one, but, of course, important to your children and that is the government says in the prosecution version that it would introduce evidence that as of December 30, 2008, you were convicted of a misdemeanor domestic violence assault under Maine law. It says here that, the victim of the state conviction was Rosanna Armstrong, his wife, by whom he then had two children.

So the question, is, did you have two children by Rosanna Armstrong, your wife, as of December 30, 2008?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you understand that the prosecution version has been changed to reflect the fact that you had not one, but two children as of then?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, have you had an opportunity, Mr. Armstrong, to review the prosecution version in this case?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: Now, you understand that this is a very important document, correct?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: What this document basically sets forth is the evidence that the government would bring to bear if the [17] matter were to go to trial. You understand.

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: And, obviously, as I told you earlier, I can't allow you to plead guilty to a crime you didn't commit, so it's very, very important that this prosecution version be accurate and true in all its detail. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Did you review it carefully with that in mind?

THE DEFENDANT: Yes, I did, Your Honor.

THE COURT: Do you understand what it is the government says happened here?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, I'm going to ask you a very important question, and, obviously, Mr. Armstrong, in this courtroom, I require a truthful answer. Do you disagree with what the government says happened in the prosecution version?

THE DEFENDANT: No, I don't, Your Honor,

THE COURT: Is the information set forth in the prosecution version true to your own personal knowledge?

THE DEFENDANT: Yes, it is, Your Honor.

THE COURT: Based on my review of the prosecution version as amended, your lawyer's responses, and your own responses, Mr. Armstrong, I find there is a factual basis for the conditional plea of

guilty to the crime charged in Count 1 [18] of the indictment.

Now, the next part of this process is for me to make sure that you're doing what you're doing of your own free will.

Has anyone threatened you or has anyone attempted to force you to get you in any way to plead guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: I take it there's no plea agreement here?

MS. VILLA: Other than the conditional plea, there is not.

THE COURT: Now, I want you to understand, Mr. Armstrong, as far as sen--as far as sentencing is concerned, that the law will permit you and your lawyer and the prosecutor to make recommendations to the court regarding sentence. However, the authority to determine the appropriate sentence in this case rests with me as the judge in this court, and if I do not accept those recommendations, you will still have no right to withdraw your conditional plea of guilty. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, the sentencing commission's advisory guidelines will be considered by the court in determining your sentence. I have an obligation to calculate the applicable sentencing guideline range and to consider that range, including increases and decreases within the guidelines [19] to arrive at that range, and once I arrive at that range, I then treat the range under the guidelines as advisory and sentence you in accordance with certain factors that are set forth in federal criminal law. Have you and Ms. Villa

talked about how these issues may affect your sentence?

THE DEFENDANT: Yes, we have, Your Honor.

THE COURT: I can't determine the advisory guideline sentence until after I've read a presentence report that the probation office will prepare and until I've given your lawyer and the prosecutor an opportunity to challenge the facts in the report. After I determine what guideline applies to a case, I still have the authority to impose a sentence that is more severe, or it could be less severe, than the sentence called for by the guideline. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, if I were to impose a sentence that's more severe than the one called for by the guideline, you will still not be permitted to withdraw your guilty plea. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, if a term of imprisonment is imposed, you will be required to actually serve in a jail or prison all of the imprisonment term, except for good-time deductions, and you will not be permitted to serve any part of it on parole. Do you understand?

[20] THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Armstrong, has anyone made any promises to you in an effort to get you to plead guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anyone made any promise to you as to what kind of sentence I will ultimately impose?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anyone made any promises to you as to what the prosecutor's recommendation is going to be?

THE DEFENDANT: No, Your Honor.

THE COURT: I ask you finally, then, Mr. Armstrong, do you still wish to plead conditionally guilty to the charge contained in Count 1 of the indictment?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And, Ms. Villa, as Mr. Armstrong's attorney, do you still recommend I accept the conditional plea of guilty?

MS. VILLA: Yes, Your Honor, I do.

THE COURT: Mr. William Armstrong, III, since you; acknowledge that you are, in fact, conditionally guilty as charged in Count 1 of the indictment, and since I find there is a factual basis for the plea, and since I find, based on your responses to my questions and my direct observations, that you are competent to enter a plea, and since I find you know of your right to a trial and the rights associated with a [21] right to a trial, and since I further find you know the maximum possible punishment that may be imposed if you are convicted, and since I find that you have not been coerced, but that you have voluntarily and knowingly tendered a plea of guilty on a conditional basis to Count 1 of this indictment, I now accept your conditional plea of guilty as tendered.

I hereby order the preparation of the customary presentence investigation report.

I am going to review with you the conditional plea. I have before me a written document that has a conditional plea, Rule 11(a)(2), and it states, my plea of guilty is conditional in that I reserve the right on

appeal from the judgment herein to have an appellate court review this court's decision dated July 8, 2011, denying my motion to dismiss indictment, and there is a signature above the signature line for defendant, William Armstrong. Is that your signature, sir?

THE DEFENDANT: Yes, it is, Your Honor.

THE COURT: Did you read this before you signed it?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: Did you have a chance to consult with

Ms. Villa before you signed it?

THE DEFENDANT: Yes, I have, Your Honor.

HE COURT: And did you understand what you were signing?

THE DEFENDANT: Yes, I do, Your Honor.

[22] THE COURT: Did you sign it voluntarily?

THE DEFENDANT: Yes, I did, Your Honor.

THE COURT: In addition to accepting your guilty plea, I also have approved your conditional plea of guilty, as well.

Now, I understand that Mr. Armstrong has been released under bail conditions; is that correct?

MS. MALONE: Yes, Your Honor, and the government recommends that those conditions continue.

THE COURT: What's the defendant's position?

MS. VILLA: We would appreciate having him be able to continue on present conditions.

THE COURT: All right. I understand from probation and pretrial services that you have not

violated any of the terms and conditions of the bail that you have been on, and, therefore, given your appropriate behavior to date, Mr. Armstrong, I'm going to order that you continue to be released under the same terms and conditions.

What's going to happen next is someone from probation will come by, and he or she will meet with you, they'll interview you, and they will prepare ultimately a report called a presentence report that will contain your history and your personal characteristics and also give me an idea a little bit more as to what you did to come here today so that I can impose a sentence ultimately that is both fair to you [23] and just for society.

Now, you will have an opportunity to review that report, and, again, I'm going to ask you to avail yourself of that opportunity, to look at the report carefully and make sure its accurate because although Ms. Villa's a fine lawyer, she hasn't lived your life. So we're all going to be relying on you to make sure that the contents of the report are accurate because, Mr. Armstrong, I do not want to sentence you on the basis of any inaccurate information. Do you understand?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Once the report has been completed, the matter will be set back here in this courtroom for the imposition of sentence. Do you understand what's going to happen next?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Is there anything further to come before the court at this time from the government?

MS. MALONE: No, Your Honor.

THE COURT: Anything further from the defendant?

MS. VILLA: Nothing further. Thank you, Your Honor.

THE COURT: The defendant is released on bail under the same terms and conditions as previously imposed.

Court will stand in recess.

(Proceedings concluded at 1:38 p.m.)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-1216

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM E. ARMSTRONG, III,

Defendant, Appellant.

Appeal from the United States District Court
for the District of Maine

[HON. JOHN A. WOODCOCK, *U.S. District Judge*]

Before

LYNCH, *Chief Judge*,
TORRUELLA and STAHL, *Circuit Judges*.

VIRGINIA G. VILLA, Assistant Federal Defender, on brief for appellant.

THOMAS E. DELAHANTY II, United States Attorney, with whom RENÉE M. BUNKER, Assistant United States Attorney, on brief for appellee.

January 18, 2013

TORRUELLA, *Circuit Judge*. Defendant-Appellant William E. Armstrong, III ("Appellant" or "Armstrong") asks us to reconsider arguments heard in and decided by this court regarding: (1) whether 18 U.S.C. § 922(g)(9) should be construed to exclude a purportedly non-violent offensive physical contact misdemeanor conviction as a predicate offense; and (2) whether applying § 922(g)(9) to such a prior conviction would violate a particular defendant's Second Amendment rights. Since Circuit precedent in *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011), and *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001), forecloses the arguments made here, we affirm the district court's denial of Armstrong's motion to dismiss the indictment.

I. Factual and Procedural Background

Armstrong was charged with one count of possessing firearms and ammunition after having been convicted of a misdemeanor crime of domestic violence in contravention of 18 U.S.C. § 922(g)(9). As a predicate offense to the charge, the indictment listed a 2008 misdemeanor conviction for Armstrong's assault of his wife in violation of Maine's simple assault statute. Prior to that conviction, Armstrong had been convicted of two simple assaults: in 1992 and 2002. The 2002 and 2008 convictions were for domestic assaults against his wife, Rosanna Armstrong.

The 2008 assault was described by the district court as follows. Armstrong's wife called the police on or about December 29, 2008, after, as she described to them, she and her husband had gotten in an argument about baking cookies, and Armstrong pushed her. She pushed him back, and the situation escalated until Armstrong hit her "hard." Armstrong was charged and convicted of domestic violence assault under Maine's simple assault statute for "intentionally, knowingly or

recklessly caus[ing] bodily injury or offensive physical contact to Rosanna Armstrong."

On May 11, 2010, the Maine State Police conducted a search under warrant of the Armstrong residence for drug paraphernalia and/or marijuana possession. During this search, the police discovered six firearms and a large amount of ammunition. Since the items were not within the scope of the warrant, the police called the Bureau of Alcohol, Tobacco & Firearms ("ATF") to inform it that Armstrong was a prohibited person and had firearms in his residence. Officers also notified Armstrong that he could not have firearms in his home. Armstrong's wife then called a family friend who came and removed the firearms and brought them to his residence, where he had possession of an SKS rifle that also belonged to Armstrong at the time the original search warrant was executed.

On May 19, 2010, the ATF executed a federal warrant at the Armstrong residence, and while the officers did not find any firearms, they recovered over 1,300 rounds of various types of ammunition. The officers requested that Armstrong appear at the sheriff's office, and Armstrong explained there that he was told to remove the firearms from his home and that his wife had called his friend, who took the guns away. Armstrong then took the officers to his friend's residence, where the ATF agents observed the six firearms noted by the Maine State Police as well as the SKS rifle.

Armstrong was arrested and charged with one count of violating § 922(g)(9). In a pre-trial motion to dismiss the indictment, Armstrong challenged the indicted charge on the grounds that it did not state a federal offense and that, as applied to a conviction for a non-violent misdemeanor offense, it violated his Second

Amendment right to keep and bear arms. The district court summarily denied Armstrong's motion, and Armstrong entered a guilty plea conditioned on his right to appeal the denial of the motion to dismiss. After a plea hearing, Armstrong's plea was accepted, and he was sentenced to three years' probation, a $2,500 fine and a $100 special assessment. He timely appealed.

II. Discussion

A. Maine Assault Conviction as Proper Predicate Offense

Appellant's argument turns on an interpretation of the statutory text of 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9). As such, it presents a question of law that we review de novo. Booker, 644 F.3d at 17, 22.

Pursuant to 18 U.S.C. § 922(g)(9), or the Lautenberg Amendment to the Gun Control Act of 1968 ("Lautenberg Amendment"), it is unlawful "for any person who has been convicted in any court of a misdemeanor crime of domestic violence, to ... possess in or affecting commerce, any firearm or ammunition." A "misdemeanor crime of domestic violence" for purposes of § 922(g)(9) has the meaning given the term in § 921(a)(33)(A), namely, an offense that:

i. is a misdemeanor under ... State ... law; and

ii. has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of a victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by

> a person similarly situated to a spouse, parent, or guardian of the victim[.]

Armstrong's predicate offense was a misdemeanor domestic violence assault conviction under Maine statute, Me. Rev. Stat. Ann. tit. 17-A, § 207-A(1)(A). That statute provides that "[a] person is guilty of domestic violence assault if [that person] violates section 207 and the victim is a family or household member." Section 207, in turn, provides that "[a] person is guilty of assault if [that person] intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A). The charging document in this case did not specify whether the nature of the predicate assault fell under the "bodily injury" or "offensive physical contact" prong of the Maine statute.

In *United States v. Nason*, this court was asked to examine whether "offensive physical contact" under Maine's assault statute — the very statute at issue here — must "necessarily involve[] the use or attempted use of physical force" to serve as a § 922(g)(9) predicate offense. 269 F.3d at 11. We disagreed with Nason's contention that the reference to "physical force" in the definition of a "misdemeanor crime of domestic violence" could not be reconciled with the "offensive physical contact" variant of assault in the Maine statute. Instead, we read the "plain and unambiguous meaning" of the phrase "physical force" to be "power, violence, or pressure directed against another person's body," which was broad enough to encompass the "offensive physical contact" variant of Maine's assault statute. *Id.* at 16, 20-21. Therefore, we found, § 922(g)(9) applies to the "offensive physical contact" component of the Maine simple assault statute. *Id.*

Specifically, we concluded that "Congress intended the federal law to cover all persons who have been convicted of assaulting domestic partners in circumstances similar to those delineated by both strains of the Maine statute," affirming the conviction and sentence imposed below. *Id.* at 12.

In this court's recent decision in *United States v. Booker*, we held that an offense with a mens rea of recklessness may qualify as a "misdemeanor crime of domestic violence" under § 922 (g)(9). 644 F.3d at 21. In making our decision, we reviewed the legislative history and intent behind the Lautenberg Amendment. *Id.* at 16. We noted Congress's decision to amend the gun law in recognition of "a problem of significant national concern in the combination of domestic violence and guns," and Congress's view of the "existing law as insufficiently protective of its victims." *Id.* Prior to the Amendment, federal law only prohibited firearm possession by convicted felons. *Id.* Since Congress concluded that the focus on felony convictions left guns in the hands of a large number of domestic abusers who were convicted of lesser crimes, often due to some combination of plea bargaining, outdated or ineffective laws that treated domestic violence as a lesser offense, and lack of cooperation from victims, it enacted the Amendment to "close th[e] dangerous loophole," *id.* (quoting 142 Cong. Rec. S10379 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein)) (internal quotation marks omitted), and "establish[] a policy of zero tolerance when it comes to guns and domestic violence," *id.* (alteration in original) (quoting 142 Cong. Rec. S8831 (daily ed. July 25, 1996) (statement of Sen. Lautenberg)) (internal quotation marks omitted).

In interpreting the breadth of the definition of "misdemeanor crime of domestic violence" in § 922(g)(9), the court in *Booker* also rejected analogizing that term to 18 U.S.C. § 16's definition of "crime of violence," which includes "an offense that has as an element the use . . . of physical force against the person or property of another." *Id.* § 16(a). Specifically, this court found that, "[i]n the course of drafting § 921(a)(33)(A), Congress expressly rejected § 16's definition of 'crime of violence,' adopting a definition of 'misdemeanor crime of violence' that was, according to the sponsor of the Lautenberg Amendment, 'probably broader' than the definition of 'crime of violence' in § 16." *Booker*, 644 F.3d at 19 (quoting 142 Cong. Rec. S11872-01, S11877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg)). We also explicitly stated that "[t]he threshold at which § 922(g)(9) will be triggered (misdemeanor crimes) is, accordingly, lower than the felony threshold set for the [Armed Career Criminal Act]." *Id.* at 21. "Whereas the ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims — those in a relationship with a perpetrator of domestic violence." *Id.* Therefore, this court found "no ambiguity in the phrase 'use . . . of physical force' when read in light of the 'text, structure, history, and purpose' of § 922(g)(9)." *Id.* (citation omitted).

On the basis of these decisions, the district court summarily denied Armstrong's motion to dismiss. We cannot but agree, noting that Armstrong's counsel conceded in her motion brief below that she had raised the same claims in the district court to no avail in *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008), *United States v. Wyman*, 667 F. Supp. 2d 151 (D. Me. 2009), and *United States v. Pettengill*, 682 F.

Supp. 2d 49 (D. Me. 2010), and, further, that this court has decided *Booker* and *Wyman* adversely to her claims (*Pettingill* remains pending). However, for the sake of thoroughness, we will address the two claims raised by Appellant here.

Appellant concedes that he "engaged in offensive physical contact with his wife." However, he argues that a misdemeanor conviction for that assault cannot constitute a predicate offense for a § 922(g)(9) charge. He asserts first that the language and history of the misdemeanor violence prohibition's incorporation into § 922(g)(9) indicates that Congress never intended the proscription to apply to *non-violent* battery convictions which encompass non-violent offensive physical contact at common law. A cursory interpretation of §§ 921(a)(33)(A) and 922(g)(9), in light of *Nason* and *Booker*, clearly indicates otherwise.

Statutory interpretation begins with the statute's language. *United States v. Hartsock*, 347 F.3d 1, 5-6 (1st Cir. 2003). "Where the language of the statute is plain and the meaning unambiguous, we will do no more than enforce the statute in accordance with those plain terms." *Booker*, 644 F.3d at 17 (citing *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 50 (1st Cir. 2010)). This court is bound by the Maine Law Court's interpretation and application of state law. *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010). We have already found the phrase "misdemeanor crime of domestic violence" to be unambiguous. *United States v. Meade*, 175 F.3d 215, 221 (1st Cir. 1999). In *Nason*, we reviewed the Maine Law Court's own interpretation of its simple assault statute's offensive-physical-contact prong, and found that it included "something less than bodily injury" but "more than a mere touching of another." *Nason*,

269 F.3d at 19 (quoting *State v. Pozzuoli*, 693 A.2d 745, 747 (Me. 1997)) (internal quotation marks omitted). In *Booker*, we pointed to Congress's express rejection of including as predicate offenses only such "crime[s] of violence" as are included in 18 U.S.C. § 16, and noted Congress's adoption of "a definition of 'misdemeanor crime of violence' that was, according to the sponsor of the Lautenberg Amendment, 'probably broader' than the definition of 'crime of violence' in § 16." *Booker*, 644 F.3d at 19 (quoting 142 Cong. Rec. at S11877 (statement of Sen. Lautenberg)). Courts have also found that Congress intended to encompass common-law batteries by including federal misdemeanor batteries in § 921(a)(33)'s definition of misdemeanor crimes of domestic violence. *See* 18 U.S.C. § 921(a)(33) (listing domestic-violence crimes that are "misdemeanor[s] under Federal . . . law"); *see, e.g.*, *United States v. Delis*, 558 F.3d 177, 178 (2nd Cir. 2009); *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982) (citing *United States v. Bell*, 505 F.2d 539, 540 (7th Cir. 1974)).

Armstrong's attempt to challenge this court's precedent through the Supreme Court's ruling in *Johnson v. United States* is unavailing. *See generally Johnson*, 130 S. Ct. 1265. First, *Johnson* was issued prior to our decision in *Booker*. Second, *Johnson* explicitly avoided deciding the question at issue here. *Id.* at 1273 ("We do not decide that the phrase ['physical force'] has the same meaning in the context of defining a *misdemeanor* crime of domestic violence [as opposed to a felony]. The issue is not before us, so we do not decide it.").

To conclude, the statute on its face, its legislative history and this court's precedent do not distinguish

between "violent" or "non-violent" misdemeanor convictions when they involve the kind of conviction at issue here, and in any case, the court fails to see how a conviction for an offensive touching such as the offensive physical contact for which Armstrong was convicted fails to constitute a predicate offense based on our prior interpretation of § 922(g)(9) predicate offense requirements of "physical force." For these reasons, we reject Appellant's first set of arguments.

Armstrong also raises a due process objection. We review this argument for plain error since Armstrong failed to raise these concerns below. *United States v. Matos*, 611 F.3d 31, 35 (1st Cir. 2010). There was no error, let alone plain error, in the district court's decision.

First, the issue that Armstrong characterizes as a "fair warning" problem is in fact a rehash of the rule of lenity argument that we squarely rejected in *Booker*. *See* 644 F.3d at 21. As we held in that case, there was no ambiguity in the phrase "use . . . of physical force" as of the time of Armstrong's conduct that led to his domestic violence conviction. *See id.* With no ambiguity, there could be no lack of warning as to the import of § 922(g). Armstrong's argument to the contrary relies on the mistaken premise that *Johnson* had any effect on the interpretation of what constitutes a "misdemeanor crime of domestic violence."

Second, Armstrong argues that he was denied due process because he did not have an opportunity to prove that the conduct underlying his domestic violence conviction was non-violent. Again, the premise of this argument fails because of its attempt to apply *Johnson* to the § 922(g) context. *Johnson* explicitly did not decide anything relating to § 922(g), much less create

a new requirement that the government must prove the degree of violence inherent in the underlying domestic misdemeanor conduct of a defendant charged under that section.

Finally, to the extent Armstrong alleges that he was denied due process because of shortcomings in Maine's procedures for adjudicating misdemeanor offenses, the argument fails. Congress explicitly addressed due process considerations with respect to misdemeanor proceedings by enacting due process protections in § 921(a)(33). These include requirements that misdemeanants have been (1) "represented by counsel in the case, or knowingly and intelligently waived their right to counsel," 18 U.S.C. § 921(a)(33)(B)(i)(I); and (2) prosecuted in jurisdictions where they were entitled to a jury trial and either received, or "knowingly and intelligently waived their right to," such a trial, *id.* § 921(a)(33)(B)(i)(II). Armstrong's convictions were full-scale convictions, he was represented by counsel, and he had additional judicial process available to challenge the factual and legal bases for his conviction by appealing to higher courts. *See, e.g., State v. Keegan*, 296 A.2d 483, 485-86 (Me. 1972) (explaining Maine's multi-tiered appeal process for misdemeanor crimes). Armstrong deliberately waived some of these state court procedures by pleading guilty, and he does not allege that his plea was not knowing or voluntary. In short, he received all of the due process protection in his misdemeanor conviction that Congress anticipated as being necessary to establish a predicate offense under § 921 (a)(33).

For all of the above-cited reasons, the court rejects Appellant's due process-based arguments.

B. Second Amendment Claim

We review constitutional challenges to federal statutes *de novo*. *Booker*, 644 F.3d at 22. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment secured an individual, and not just a collective, right to bear arms. *Id.* at 576-626. *Heller* expressly left for "future evaluation" the precise level of scrutiny to be applied to laws that allegedly infringe Second Amendment rights. *Id.* at 626, 629, 634-35.

In *Booker*, this court directly addressed the issue of whether, in light of the Supreme Court's recognition in *Heller* that an individual right to gun ownership is protected by the Second Amendment, convictions under § 922(g)(9) must be found unconstitutional. *Booker*, 644 F.3d at 22. We found the "animating interest" of § 922(g)(9) to be in "keeping guns away from people who have been proven to engage in violence with those with whom they share a domestically intimate or familial relationship, or who live with them or the like." *Id.* at 25. We also found a "substantial relationship between § 922(g)(9)'s disqualification of domestic violence misdemeanants from gun ownership and the governmental interest in preventing gun violence in the home" since "[s]tatistics bear out the Supreme Court's observation that 'firearms and domestic strife are a potentially deadly combination nationwide.'" *Id.* (quoting *United States v. Hayes*, 555 U.S. 415, 427 (2009)). We accordingly held that § 922(g)(9) "substantially promotes an important government interest in preventing domestic gun

violence," rejecting the appellants' Second Amendment challenge to the law. *Id.* at 26.

Armstrong attempts to distinguish this case from *Booker* by framing the Second Amendment challenge to § 922(g)(9) therein as a "facial" challenge as compared to the instant "as-applied" challenge. Specifically, he contends that, if the relevant misdemeanor conviction is not based on violent behavior, the statute cannot survive intermediate scrutiny as applied because the basis for the proscription is not tailored closely enough to the identified governmental interest to justify the deprivation of a core constitutional right.

As an initial matter, this court has not adopted intermediate scrutiny as the appropriate type of review for a challenge such as Armstrong's. *See Booker*, 644 F.3d at 25. Nonetheless, under any standard, Armstrong's claim fails.

First, Appellant has already conceded in the court below that his arguments are identical to those made in the lower court in *Booker* regarding the constitutionality of § 922(g)(9). An as-applied challenge following a failed facial challenge to the constitutionality of a statute cannot prevail if it is based on "the same type of fact situation that was envisioned by th[e] court when the facial challenge was denied." *McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004); *see also Republican Nat. Comm. v. Fed. Election Comm'n*, 698 F. Supp. 2d 150, 157 (D. D.C. 2010) ("In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision."), *aff'd*, 130 S. Ct. 3544 (2010). Therefore, since Armstrong attempts to assert an as-

applied challenge to the same kind of fact situation envisioned in *Booker*, it must fail.

Second, Appellant's arguments fail as an "as-applied" challenge because a sufficient nexus exists here between the important government interest and the disqualification of domestic violence misdemeanants like Appellant. As we found above, the statute encompasses the kind of "physical force" that Appellant was convicted of using under the Maine domestic violence assault statute. Further, in targeting such misdemeanants for its proscriptions, Congress stated clear reasons for effectuating the governmental interest through its broadening of the scope of the firearm proscription so as to provide more substantial protections for victims of domestic violence. Specifically, the Lautenberg Amendment was enacted because Congress found the focus on felony convictions too narrow. *Booker*, 644 F.3d at 16. By broadening the proscription to misdemeanants like Appellant, Congress sought to "alleviate the danger of intimate homicide by convicted abusers." *Id.* at 26. Research that we described in *Booker* linking the presence of a gun in the home of a convicted domestic abuser with increased risk of homicide applies equally here to justify the restraint on Appellant's constitutional rights. We therefore reject Armstrong's challenge to the constitutionality of applying § 922(g)(9) to him.

III. Conclusion

For the foregoing reasons, we **affirm** the district court.